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CAPITAL PUNISHMENT,

BASED ON

Karl Joseph Anton von

PROFESSOR MITTERMAIER'S

'TODESSTRAFE.'

Hanc tollite ex civitate, judices; hanc pati nolite diutius in hac republica versari; quæ non modo id habet in se mali, quod tot cives atrocissime sustulit, verum etiam hominibus lenissimis ademit misericordiam consuetudine incommodorum.—CICERO: *Pro Sex. Roscio Amerino*, cap. 53.

EDITED BY

JOHN MACRAE MOIR, M.A.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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TO THE

RIGHT HON. LORD BROUGHAM AND VAUX,

"WHO,"

(TO QUOTE THE WORDS OF PROFESSOR MITTERMAIER,)

"IN GERMANY, AS IN ALL OTHER COUNTRIES,

IS VENERATED AS ONE OF THE MOST DISTINGUISHED JURISTS,

COMBINING THE RICHEST EXPERIENCE OF OLD AGE

WITH YOUTHFUL FRESHNESS OF MIND,"

This Work

IS MOST RESPECTFULLY DEDICATED BY

THE EDITOR.

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DEAR STANSFELD,—

ALLOW me to claim your friendly interest for a Book which only requires to be known in order to produce certain beneficial results.

You will, I doubt not, ere long, be called upon, as a member of the Legislature, to express an opinion on this question, which *must* soon be decided.

Both for that reason, and as an expression of my individual devotedness to yourself, I felt as if I could not dismiss this little labour of mine without writing these few words.

Yours ever,
J. M. M.

JAMES STANSFELD, Esq., LL.B., M.P.
&c. &c. &c.

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PREFACE.

A TREATISE from Professor Mittermaier's pen on any topic connected with the theory or practice of the law, is worthy of perusal by the profession; but there is no subject on which he is more entitled to be heard, than the one discussed in the following pages. The events of every day show, that this is a topic of interest not only to lawyers, but to the public at large.

For a long series of years Professor Mittermaier has devoted a large portion of his time and abilities to the investigation of this most important question. He is no mere theoretical opponent to Capital Punishment, and the advocates for the maintenance of the penalty will find in him a fair though powerful antagonist.

In order to adapt the work to the requirements of the English reader, it appeared necessary to make a few alterations. Accordingly in Chapters I. and II. fuller details regarding the history of the subject, and the writers on it, have been given. Besides, a concluding chapter has been added, in which the question has been considered in its special bearing on the actual state of England.

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Since the sheets were in type, Professor Mittermaier has kindly forwarded the results of his continued investigations with regard to the literature, statistics, and legislation on Capital Punishment in various countries up to the present date. I regret that these valuable materials could not be embodied in this edition.

In the preparation of the work I readily acknowledge my great obligations to J. Schönemann, Esq., whose acquaintance with the literature of his own country, as well as that of France and of Italy, and whose classical and historical learning have been to me an important and almost indispensable assistance.

I am also indebted to M. A. Garvey, Esq., LL.B., G. Harry Palmer, Esq., M.A., and F. W. Ramsay, Esq., M.D., for various valuable suggestions, and to Mr. William Tallack, the secretary of the Society for the Abolition of Capital Punishment, for courteously placing at my disposal books and notes relating to the subject.

Dr. Charles H. Schaible, a friend of Professor Mittermaier's family, has kindly furnished the short biography which immediately follows.

J. MACRAE MOIR.

2, *Middle Temple Lane, Temple,*
January 20th, 1865.

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PASSAGES FROM THE

LIFE OF KARL JOSEF ANTON MITTERMAIER,

PROFESSOR OF LAW IN THE UNIVERSITY OF HEIDELBERG.

By KARL SCHAIBLE, Ph.D., M.D.,

ROYAL MILITARY ACADEMY, WOOLWICH; EXAMINER IN THE UNIVERSITY OF LONDON.

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PASSAGES FROM THE

LIFE OF KARL JOSEF ANTON MITTERMAIER.

In sketching the life of a man of science, it is seldom that we have to report deeds which at once command public attention, such as the glorious exploits of a victorious general, or to describe works like the productions of a celebrated artist. The man of science does not fight bloody battles, or erect cathedrals rising up to the sky, which perpetuate his name to distant ages. His struggles, victories, and conquests, are accomplished in silence, and the monuments which he leaves behind him are visible only to the intellectual eye. Nevertheless, his activity is far more conducive to the progress of mankind, although less apparent. He who has opened new paths to science, who has successfully combated ignorance, the heaviest fetter of humanity, or, as a teacher, has promoted the intellectual development of thousands, has performed more noble and more enduring work than the mightiest warrior. Such a champion in the field of the intellect, who in his long life has gained many a victory, and is still, in advanced age, successfully carrying on the work, is K. J. A. Mittermaier. He has not only spread light far and wide by his numerous writings on jurisprudence, but he has also been the personal instructor of many thousand scholars who have flocked around him from various lands, to listen to his animating words, and who now, engaged in the business of life as lawyers, statesmen,

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legislators, and men of letters, cherish a grateful remembrance of their former master. As a legislator, he has himself had the satisfaction of seeing many of his views on law adopted practically by entire nations; and with all the comprehensive and varied activity of his mind, he has preserved up to a venerable old age such purity of soul, such a warm and feeling heart, that any hostile feelings to which the passion of parties may have given rise in the midst of his active career, have long since subsided. I will endeavour to draw a short sketch of the literary and political life and activity of this distinguished man.

K. J. A. Mittermaier was born on the 8th August, 1787, in Munich, where his father was an apothecary. His mother possessed a calm, clear, and acute intellect, and great activity: his father had extensive knowledge in natural history, a quick understanding, and a gentle, pure, almost enthusiastic mind. The son appears to have inherited the qualities of both his parents, but chiefly those of his father. It may be of some interest to mention here that his father's brother-in-law was the well-known seaman Zimmermann, who repeatedly sailed round the world as Captain Cook's steersman. The uncle's highly coloured descriptions of distant lands nearly induced his nephew to turn sailor, and certainly aroused in him, at an early age, that constant inclination for travelling which he subsequently lost no opportunity of gratifying.

Unfortunately, Mittermaier did not long enjoy the loving guidance of his father, who died at a comparatively early age. His mother married again; but the intercourse between the lively boy and the rather gloomy, severe stepfather was not very intimate. The boy was sent to the school of a clergyman, a hard, narrow-minded man, who, however, possessed an uncommon knowledge of ancient and modern languages, and implanted in his pupil a love for foreign languages, which, at a later period, proved of the greatest advantage to him. Thus, in his eleventh year, Mittermaier was qualified to act in his stepfather's shop as interpreter to the French

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armies, which at that period were marching through Munich. Mittermaier was subsequently a pupil of the Lyceum of that city, the masters of which, though Roman Catholic clergymen, were men of liberal education, and aimed at general refinement of mind. At this time Mittermaier showed a special inclination for the natural sciences: he intended to become a surveyor of mines; and, for this purpose, in his thirteenth year, he passed the preliminary examination held by the Government. But on account of his apparently very weak health, his stepfather would not allow him to continue in this career. For the same reason, he was prevented from studying medicine. Accordingly, when in his sixteenth year, he entered the University of Landshut (Bavaria) as a student of law; but, faithful to his early predilections, he continued to attend lectures on the natural sciences, anatomy, and medicine. The direction of his mind, which will be indicated in another place, to treat jurisprudence as a kind of natural history, his clear perception of the importance, for the lawyer, of forensic medicine, and especially of that branch of it which relates to mental diseases, and his comprehensive knowledge of this subject, are undoubtedly attributable to the early development of his youthful inclination. That he did not neglect the study of philosophy, however, is proved by the fact that when a young student he wrote a book (unpublished) on the Law of Nature (Naturrecht). Mittermaier was obliged, at that period, to increase his income by giving private instruction. He became a tutor in the family of Herr von Zentner, then Bavarian Minister of State, continuing to attend the university lectures, and Herr von Zentner, who had formerly been a professor in the University of Heidelberg, kindly assisting him in his studies. Having concluded his university career, Mittermaier practised as an advocate in Munich. At this period, an intimate friendship was formed between the young lawyer and the celebrated jurist Feuerbach, who became one of the ministers, and was charged with the compilation of the Bavarian Criminal Code. Mittermaier, well versed in languages, assisted Feuer-

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bach, by furnishing him with translations of and extracts from French and Italian laws. Thus Mittermaier not only became thoroughly acquainted with the criminal law of Bavaria, but at an early age made himself familiar with the difficulties of legislation.

He now resolved to devote himself to an academical career, but wished first to visit other universities. For this purpose, a small stipend of 600 florins was granted to him by the parsimonious government, which probably considered this amply sufficient for the young man, apparently suffering from disease of the lungs, and not likely to live much longer. This ill-judged economy nearly occasioned the death of the protégé of the liberal government, since it compelled him to eke out his scanty income by giving numerous private lessons in law at the University of Heidelberg, which he visited in 1808, and where he attended the lectures of Martin, Thibaut, Heise, Zachariæ, and Klüber, then the ornaments of that university. A severe typhus fever was the consequence of this overwork in Heidelberg.

At Heidelberg his feelings of patriotism were powerfully aroused at this time by his intimacy with a great number of noble men, who were filled with hatred against the all-powerful Napoleon, and were labouring for the regeneration of Germany.

In the autumn of 1808 he undertook his first journey to Italy, and studied that country and its people, whose language and literature he had loved from his earliest youth.

His literary activity at that period is shown by a work entitled *The Doctrine of Evidence in Criminal Cases.* An improved edition of this book was published in 1822; and it has been translated into French and Italian.

At the beginning of 1809 a chair in the newly founded Bavarian University of Innsbruck, in the Tyrol, was offered to him. Scarcely yet recovered from the typhus fever, Mittermaier passed the prescribed LL.D. examination before entering upon his duties. But just then the people of the Tyrol rose victoriously against Bavaria and France, her ally and protector;

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and, instead of Bavarian professors, the noble patriot Andreas Hofer and his riflemen marched into Innsbruck.

In 1809 Mittermaier became a lecturer in his old University of Landshut, where the celebrated Savigny received him as a friend, and made over to him the lectures on Roman Law. Besides this subject Mittermaier delivered lectures on Criminal Law, and on the history of German Law, &c.

In 1811 he obtained a professorial chair in the same University, having declined a similar offer from the University of Kiel. In the following year he married the sister of his friend Walther, the father of modern German surgery. This choice was a happy one; for during the long active life of Mittermaier, his wife, who bore him seven children, has not only been a true and loving companion to him, but with a clear mind and sympathetic heart, has fully associated herself with his higher aspirations. She is still active in body and soul; her husband's untiring companion and helpmate. When Mittermaier married the times were stormy. After long oppression the German people rose against Napoleon; the University of Landshut was not behind her German sisters in German feeling and patriotic deeds; and numerous young men hastened from the lecture-room to the field of battle. Not until events again gave the mind repose did Mittermaier resume his literary occupations.

To this period belongs the publication of two works of Mittermaier, *The Introduction to the Study of the History of German Law*, and the *Handbook of Forms and Procedures in Criminal Law* [*Handbuch des Peinlichen Processes*], in which latter he was the first to treat scientifically a subject then much neglected in Germany. He compared the German and the French modes of criminal procedure, and demanded the introduction of the systems of public trial by oral evidence, in opposition to the then existing system of secret examination before a government law officer, who took down in writing the answers of the accused, and laid them before a council of judges for judgment; but at the

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same time he pointed out also the defects of the French system.

The university honoured the young professor by electing him three times in succession as its rector, in which capacity he reduced the confused affairs of the university to order, and thus earned the general thanks of the country.

In scientific circles Mittermaier was already regarded as one of the greatest authorities on Criminal Law, German Civil Law, and Law Proceedings in Civil Matters; and many Universities tried to secure his services. He declined a chair at Halle (1818); but in 1819 he accepted one at the newly-founded University of Bonn (Rhenish Prussia). Here, in the Rhine lands, where French law, even after the country's deliverance from France, had remained in full force, Mittermaier studied French Legal Practice, and introduced practical exercises for preparing students for the bar. At this time he published a work on *The Fundamental Deficiencies of Criminal Law as exhibited in Manuals and Codes.* In this book he pointed out, how serious a mistake it is to admit into a code too many general, and purely scientific doctrines which cannot be applied to individual cases. Various circumstances rendered his short residence at Bonn unpleasant to him, in spite of his intimate relations with the circle of eminent scholars who had gathered there. He was charged with the temporary administration of the office of University Judge, *i. e.* magistrate of the students, who are in German Universities under a separate jurisdiction. During this period occurred the great persecution of the popular leaders, by which the German Sovereigns, at the command of their Russian master, showed their gratitude to the German people, who had saved them from Bonaparte. In no part of Germany was this persecution carried on with more violence and blind rage than in Prussia; and the professors of Bonn, against whom the narrow-minded, stupid king had a personal antipathy, were particularly exposed to the storm.

Under these circumstances Mittermaier, in 1821, willingly

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accepted a chair at the University of Heidelberg, where he has ever since laboured uninterruptedly, refusing various offers of chairs at other universities and institutions. Here was fully developed one of the most characteristic features of his activity, which had reference to the practical wants of his time and country. While his energy as an author and a teacher continued without interruption; while the number of his auditors gradually increased to thousands, drawn from the most distant countries; he now entered into immediate connection with the parliamentary and political life of his adopted country, Baden. At present it is not easy to form a calm judgment on the influence exercised by Baden during the period from 1830 to 1848, on the political development of the whole of Germany. The revolutions which have subsequently extended over great countries; the struggles for lofty objects which are still going on, have removed the events of that time to the background, and have dimmed the recollection of them, so that the views entertained respecting that period are frequently confused and inaccurate. The men devoted to political reaction in Germany make the liberal agitation of Baden at that time responsible for the commotions of the following period; and many of the patriotic and bold men, who look only forward, forget that the fruits of the present would never have been ripened without the preparatory work of that eventful epoch. But history will not refuse her acknowledgment to the labours of the deputies of the people of Baden, to the legislative deeds of the practical politicians of that country, guided by the theoretical politicians of the two Universities, Heidelberg and Freiburg. History will establish as an honourable fact, that the parliamentary life of Baden at that time, when in Prussia not even the beginning of a more liberal development could be discerned, has been the school for the constitutional life of the whole of Germany.

Among the highly honoured men who devoted themselves to this arduous task, Mittermaier, by universal consent, stands in the first rank. As early as 1827 he became a member of the

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Legislative Committee of Baden, in which he was associated with Nebenius, Bekk, Duttlinger, Yolly, and other prominent men in the service of Baden, up to the dissolution of the Committee about 1845. In co-operation with them, he created the criminal code, which has served as a model for many other similar compilations. This is especially true of the books relating to the criminal code, which were based upon the system of public trial by oral evidence. With regard to criminal procedure, Mittermaier directed the public attention to England; and showed that the necessary basis of such a procedure as deserved confidence, especially as regards the impartial treatment of the complainant and of the defendant, existed in the legal practice of England much more than in that of France.

Mittermaier soon had an opportunity of taking an active and influential part in the political affairs of Baden, for in 1831 he was elected a member of the Lower House. In this sketch it is impossible to describe in detail his activity in the field of politics. The most important questions of legislation, and of the entire constitutional life of the country were originated and promoted by Mittermaier. He was in the front rank during the struggles of that period for the liberty of the press; to his efforts were chiefly due the laws which freed the soil from the last remnant of feudal rights (Zehntablössung), and the "Forms and Procedures in Civil Law" (Bürgerliche Processordnung). It was he who, as reporter of the Committee of the Lower House, to which the subject had been referred, overcame the greatest difficulties in carrying the new communal law (Gemeindeordnung), which gave to the smallest village, as in Switzerland, an independent self-government, which even in England towns only possess. The success of these labours was greatly promoted by his benevolent, conciliatory manners, which led to his election as president (or speaker) of the Lower House in the succeeding parliaments from 1833 to 1840. This office prevented him from joining any political party, but in opinion he belonged to the moderate

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liberal section of the opposition, which, after the death of Winter, Minister of State, was destined to become a real opposition party. At this period he received an honourable distinction, which of all the many titles, decorations, and honours bestowed upon him,* gave him the greatest pleasure—viz., the Freedom of the City of Heidelberg. Since that time he has displayed the greatest zeal in the affairs of his fellow-citizens, of whose common council he is a member. As administrator of the Lyceum, as councillor, as one of the founders, and for many years chairman, of the "Society of Benevolence," and of the Orphan Asylum, and as a member of various useful societies, he has untiringly devoted his time even to purely communal affairs. Even now, in advanced age, he is not prevented by any circumstance from giving weekly lectures on moral and scientific subjects to the children of the Orphan Asylum, an entirely unsectarian institution.

Besides his activity in German science, in political affairs, and in the more limited concerns of the town in which he resides, Mittermaier had long been engaged in the study of foreign laws, which, in various ways, re-acted upon his own views, an influence which was strengthened by his travels and his personal intercourse with foreign scholars. Italy, a country with whose judicial system Germany would scarcely have become acquainted but for the labours of Mittermaier, he had, as already stated, visited in his youth; and the connections which had been subsequently formed through his acquaintance with the language, literature, and especially the mediæval law-history of the country, grew into intimate personal friendships with the best representatives of scientific Italy, to the various chief cities of which he made frequent and prolonged visits. He published the results of his Italian studies in his work en-

* German, French, Belgian, Italian, and Portuguese decorations of knighthood were bestowed upon him in great numbers; almost all the judicial faculties and societies elected him a member of their bodies; and the University of Cambridge, in the United States, made him a Doctor of American Law.

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titled *The State of Italy* (*Italienische Zustände*), in which he displayed great and deserved affection for that country and its people. The book was immediately translated into Italian, and at once secured for its author the warm gratitude of the Italians, who found in it a hearty recognition of their nationality. They have since greeted him with genuine enthusiasm when he has addressed them, at their scientific meetings, in their own melodious tongue.

In a similar manner, during a prolonged residence in Paris (1827), Mittermaier became intimate with many French jurists; and, as at that time a number of the most eminent men of Spain and Portugal, devoted both to liberty and to science, were living in France as exiles, he enjoyed a personal intercourse with them also, which he turned to good account. With his French, Spanish, and Portuguese friends, Mittermaier has ever since kept up an active scientific correspondence.

With not a few eminent scholars and statesmen of Belgium also, in which country he has repeatedly resided, Mittermaier has formed personal friendships, some of which originated more than thirty years ago.

His ardent desire to visit North America has not been fulfilled; nevertheless, he has succeeded in becoming acquainted with many legislators and scholars belonging to the various States of that Continent, and has carried on with them a lively correspondence.

As has been already said, Mittermaier, at the commencement of his literary life, made the laws of England the object of zealous studies. Connections subsequently formed with eminent Englishmen were of great service to him. His growing conviction of the great importance of the development of English law, especially in reference to the reform of the German Criminal Code, induced him, in spite of his already advanced years, to visit England and Scotland in 1850. Prepared for this journey by a renewed study of the English language, and of the great law institutions of the land, he

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particularly endeavoured to acquire an exact knowledge of English criminal law. In this he was greatly assisted by the kindness of Lord Ebrington, of Mr. Colquhoun, and others; and by the friendship of Messrs. Jardine and Hardwick, who were at that time magistrates in London; by Mr. Dowling; and by Messrs. Best, Austin, and Bowyer. Colonel Jebb, who was then at the head of the penal establishments, the Reverend Mr. Clay, of Preston, and Captain Crofton, of Dublin, also furnished him with valuable information respecting the organization of English and Irish prisons. At that time he had the honour of being elected a corresponding member of the Juridical Society and of the Association for the Promotion of Social Science. He published the results of his studies in England in his works *On the English Prison-System*, and on *English, Scottish, and North American Criminal Procedure*.

By means of his intercourse with eminent foreign jurists, and of his large collection of juridical works in various languages,* Mittermaier gradually acquired such an extensive and comprehensive knowledge of foreign law as probably nobody ever possessed before him; and it became the custom in Germany, whenever a question of foreign law was to be decided either in a court of law or as a matter of science, to consult Mittermaier as a true oracle.

Having thus given a general account of Mittermaier's labours in the department of foreign law, we now return to his active life at the beginning of 1840. The remarkable political activity which was manifested at this time in various parts of Germany found Mittermaier in retirement and suffering severely from the recent loss of his promising eldest son. Scarcely, however, had he returned in the autumn of 1845 from Italy, where, as representative of Germany, he had attended the great Italian scientific Congress at Naples, when

* He had begun the formation of this collection when a young man. After a pedestrian tour in Italy he had brought home, in his knapsack, some rare Italian works on mediæval law.

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the general elections for the Lower House of Baden commenced. He was induced again to accept a seat in that assembly, of which he was again elected Speaker. In the meantime, the breach between the Liberal majority of the House and the Government had become wider. One cause of this was the refusal of the Government to grant full civil equality with the adherents of the recognized creeds, to the newly formed religious community called "German Catholics," which aimed at a reformed Catholic Church, separated from Rome. The position of the Speaker, who still adhered to his Liberal principles and zealously supported the claim of the German Catholics, although he did not embrace their views, had thus become very difficult. That Mittermaier, nevertheless, was able to combine the maintenance of his principles with due respect for parliamentary right and usage, proves his great talent for public life, as well as the respect which he enjoyed.

The years 1846 and 1847 are of the greatest importance in their bearing on the relations of German science to German practical life. In them were held, at Frankfurt and Lübeck, two meetings, called meetings of "Germanists" (Germanistenversammlungen), in which Mittermaier took a most active part. The first meeting requested him to undertake the consideration of the question of "juries," regarded from a practical and juridical point of view. His report, which he read the following year to the meeting at Lübeck, was considered as the official recognition, so to say, on the part of German jurisprudence, of the much debated institution of juries; and thus prepared the way for its subsequent adoption, when in March, 1848, the German nation, rising *en masse*, claimed this along with many other reforms, in their demand of rights, called "Märzforderung."

This stormy and eventful epoch was approaching. The German people, after having, by the greatest possible sacrifices, won its freedom in the wars of independence against Bonaparte, now made its first attempt, by endeavouring to create a free and united Germany, to take that rank among the nations

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which is due to its high and noble aspirations after truth and right, as well as to its moral character, its courage, and its perseverance. The attempt failed at that time, because the people, unfortunately too ready to trust the oaths of its sovereigns, allowed its hardly acquired power to escape from its grasp again. Nevertheless, the high aim of the German nation will be reached sooner or later; for Germany, by its reformation of the Church, by its literary regeneration in the last century, and by its war of independence against Napoleon, has sufficiently shown its national strength; and it will, with untiring perseverance, accomplish its political regeneration also. It may be well anticipated that in this violent commotion of the German people, in 1848, Mittermaier took an active part. In the preliminary German Parliament, assembled at Frankfurt, called "Vorparlament," to which most of the patriotic Germans hastened, in order to guide the Revolution, the general confidence of the assembly immediately called Mittermaier to the chair; and, in the succeeding "constitutional parliament," he belonged to a great number of committees, and was one of the most active members. At the same time, he remained faithful to his political convictions, which were of a moderately liberal hue. He did not join the Republicans, whose views and want of confidence in the governments and sovereigns were justified by subsequent events; nor was he afraid, like the Conservatives, of the consequences of the long-desired constitutional liberty of the nation. In all the great questions of that epoch—for instance, universal suffrage, and personal freedom from the arbitrary rule of the sovereigns—he stood faithfully in the ranks of the people. Not all his former companions kept by his side: too many, who had formerly claimed the honourable epithet of the people's friends, timidly retreated when the hour came to realize popular rights.

These men made Mittermaier the object of most violent attacks, because they could not see without a bitter feeling a man of such high reputation remaining faithful to liberty, which they had shamefully deserted. These attacks, which have

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in no way diminished the respect which Mittermaier enjoys, were the more unworthy, as being directed against a man who had never allowed any feeling of personal irritation or hostility to mingle with his scientific or political opposition; who, on the contrary, has always displayed towards his opponents the greatest mildness—in which he may indeed have erred, since mildness is not always compatible with vigorous political opposition.

Since 1849, Mittermaier has abstained from all direct political action. He has probably been of opinion that he could do more to promote the welfare of the people by devoting himself more exclusively to scientific pursuits, and by promoting charitable institutions in the town where he dwells. Accordingly, he has ever since steadfastly refused to comply with the most urgent requests to allow himself to be re-elected a member of the Lower House, and has laboured with greater zeal in his calling of an instructor and author. To this period belongs his renewed study of English law, his journey to England, already mentioned, and his works on the institution of juries, whereby he has, more than any one else, contributed to a better knowledge of that institution and to its practical improvement in Germany. At this period, also, he resumed his efforts against *Capital Punishment*, which he had commenced with considerable success in the German Constitutional Parliament at Frankfurt; and it is owing to his exertions that some German criminal codes have been entirely freed from this blemish. The improvement of the systems of prison discipline occupied at the same time much of Mittermaier's attention, and he published several works on that subject. Both as an ordinary member and as chairman, he took an active and prominent part in the Congresses at Brussels and Frankfurt, the chief topics of discussion at which were prison discipline and charity. Moreover, with youthful zeal, he visited lunatic asylums and prisons, in order to obtain a clear perception of the connection between diseases of the mind and crimes, and consequently of moral responsi-

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bility. At the same time, he continued to deliver uninterruptedly his lectures on criminal law and criminal procedure, which were, and still are, listened to by large audiences. In addition to these varied labours, he has, for a considerable period, discharged in the University of Heidelberg the duties of chairman of the Court of Arbitration, called "Spruch-collegium," a peculiar German institution, according to which the professors of the faculties of law pronounce judgment on difficult legal points.

Our space does not permit us to describe in detail the activity of Mittermaier as an *author*, or to enumerate all his very numerous works, and their translations into foreign languages, as they appeared either in German, French, Italian, or Spanish reviews and periodicals, or as independent works. We will, however, mention a few of his principal works in the various departments of law. His *Laws of Evidence in Criminal Matters*, and the *Handbook of Forms and Procedures in Criminal Law* (1810–11), now transformed in a fourth edition into *The German Criminal Procedure* (1845–46), have been already mentioned. In the *Art of Defence* (1st edition, 1814; 4th, 1845), this important part of the criminal procedure was treated scientifically for the first time. A sequel to this is the work entitled *The Principle of a Public Prosecution by means of an oral Charge: the Trial by Jury* (1845), which greatly contributed to the abolition of written legal proceedings, which had formerly been usual. His *English, Scottish, and North-American Criminal Procedure* (1851) has been already mentioned. The development of criminal procedure since 1848 is represented in the work *Legislation on, and Legal Practice in, Matters of Criminal Procedure* (1856); and, finally, Mittermaier is at present engaged upon a partly-published work, *Experiences relating to the Efficacy of Juries* (1864). The object of this work is to secure the permanence of the institution of trial by jury, by removing its imperfections and by supplying its deficiencies. In this endeavour, Mittermaier takes the English system as his principal model. On the subject of the material

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part of criminal law, he has rendered most valuable service by his new edition of Feuerbach's *Manual*, and by an extensive series of essays published in a periodical edited by him, called *New Archives of Criminal Law* (1817–56), in which he has traced continuously the development of legislation and of law literature. The most important work in this department appears to us to be that on *Capital Punishment*, which is now rendered accessible to English readers. The 7th edition of his book entitled *Maxims of German Civil Law* was published in 1847. The subject of procedure in civil law was ably treated in his four *Contributions*, which appeared in the years 1820–26. The *Archives for Practice in Civil Law*, edited by Mittermaier, from 1818 to the present time, as well as his *Archives for Criminal Law*, afforded him opportunities of writing a running commentary on characteristic facts in the domain of judicial procedures. Besides these two legal periodicals, he edited, from 1828 till 1856, another, the *Critical Review, relating to the Legislation and Jurisprudence of Foreign Countries*, in which his knowledge of foreign juristic literature was made useful to all his German colleagues. Of Mittermaier's other very numerous works we will mention only the two important treatises on prison discipline, *Improvement of Prisons* (1858), and *The Prison Question* (1860).

The chief characteristic of Mittermaier's works is his peculiar and original method of treating the science of law in the same way as the naturalist now treats the physical sciences. As the naturalist has long ceased to invent the laws of nature out of his own imagination; but, adopting a totally different course, carefully collects observations of phenomena as a basis for theory, that is, for the most general expression of the law manifested in those phenomena; so Mittermaier, in the domain of law, endeavoured to ascertain what institutions have been established by men at various epochs and in various places, and what effects such institutions have produced; believing that only in that way could a clear perception of the general idea of law be obtained. But in proceeding thus he never fell

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into the great error of considering as absolutely and immutably best that which has had an historical existence; on the contrary, he has never been afraid of advocating even the most thorough innovation as soon as he has recognized its abstract justice and practical fitness. Closely connected with this direction of thought are his efforts in favour of law reforms, based upon his knowledge of foreign institutions. If he had restricted his studies to the field of German law, his conclusions could not have been free from one-sidedness—a defect from which his little less than universal knowledge has almost wholly preserved them. Thus he has succeeded in rendering the study of foreign literature and legal institutions a necessary part of German legal science; while he has carefully avoided the mistake of unduly exalting foreign systems over those which prevail in his own country. In fact, he and Eichhorn were the founders of the science of German civil law; and he has constantly and unsparingly condemned the blind imitation of French law institutions in criminal law and criminal procedure.

Another striking characteristic of Mittermaier's mind is its constant direction towards the practical side of every question. Theory has an interest for him only in so far as it can be made subservient to the practical objects of life: he has always been averse to the abandonment of practical advantages for the mere sake of theoretical perfection. Law never presented itself to his mind as an abstract object of thought, on which intellectual subtilty may be exercised; on the contrary, he has ever regarded it as the embodiment of popular rights, living in the consciousness of the people, constantly growing and assuming new forms. Accordingly, his own perception of law has undergone uninterrupted development; every day he has endeavoured to learn something new, and to detect errors which he was never ashamed of acknowledging and abandoning. Thus may be explained his course in reference to the question of trial by jury. At the time when the utmost efforts were required in order to convince governments and lawyers of the great value of oral and

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public legal proceedings, Mittermaier, anxious not to imperil the success of these efforts, considered it more prudent to defer the discussion of the jury question. Besides, he was then best acquainted with the French jury system, which he justly considered very defective. But when the basis of public and oral legal proceedings was securely laid, he directed his energies to the new struggle, and contributed, more than any other individual, to the speedy adoption of trial by jury. Pure theorists, who deem it derogatory to learn from experience, and rigid supporters of what is established, were, of course, equally incapable of understanding and appreciating such a course of action.

In concluding this rapid sketch, we may say that, even if Mittermaier's labours had been confined to the single object of reforming the Criminal Law, his success in that aim would have sufficed to entitle him to be regarded as one of the greatest benefactors of the German people. No one has done so much as he to free that law from the reproach of cruelty and unjustifiable severity. A comparison of the German criminal law, as it existed at the beginning of this century, even after its first scientific reform by the gigantic minds of Feuerbach and Grolmann, with its present state, will be sufficient to convince every one of the truth of this assertion. In the history of German jurisprudence, Mittermaier's name will never perish; and posterity will remember him with thankful reverence for his disinterested exertions in the cause of humanity, and especially for his efforts to bring about the abolition of *capital punishment*—a remnant of barbarous times, which will soon be swept away by the spread of knowledge and of sound views of jurisprudence.

I here conclude my sketch of this long and well-filled public life. This is not the place for an account of Mittermaier's private life, of which I will only say, that it is pure and clear as crystal, and in perfect harmony with the noble character and aims to which I have endeavoured to do justice in the preceding pages.

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May the youthful old man still work on for many, many years, with unabated strength; and may he live to see the days when, in a united and free Germany, the seed that he has sown shall have produced a rich and abundant harvest.

CHARLES H. SCHAIBLE.

Royal Military Academy, Woolwich,
November, 1864.

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CAPITAL PUNISHMENT,

BASED ON

PROFESSOR MITTERMAIER'S

'TODESSTRAFE.'

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CAPITAL PUNISHMENT.

CHAPTER I.

CAPITAL PUNISHMENTS—PENALTIES IN GENERAL—HISTORICAL SKETCH.

The History of Penal Legislation shows that the views of every nation regarding the infliction of Death Punishment have, in the process of time, undergone important changes. Equally important are the differences which contemporaneously exist in the legislation of any two great nations regarding the subject. The nature and definition of the crimes by which a man forfeits his life —the procedure by which the fact of their perpetration is ascertained—the mode of putting the culprit to death, widely differ in different countries. The truth is, the laws on the infliction of death, which form the most important portion of the Penal Code, spring from the history, and are based upon the moral and religious views and the political constitution of a people. As a country advances in civilization, its Criminal Code is altered, and experience shows, that with the progress of civilization the

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Laws have been mitigated, the crimes by which the life of man is forfeited have been more clearly defined, and greatly reduced in number.

It is unnecessary for our purpose that we should give here a complete historical survey of Penal Legislation in general, or of Capital Punishment in particular; but the great influence which the legislation of the Romans has had in developing the views of living nations, renders it incumbent on us to pay special attention to the results they have arrived at regarding the subject under discussion.[1]

In the Penal Law of the ancients there are three fundamental ideas :—

1. *Lex talionis.*
2. Belief in the necessity of Criminal Law as a deterrent.
3. The notion of making atonement to an offended Deity.

1. *Lex talionis.*—The principle of *Lex talionis*, or the law of retaliation, is more or less perceptible in the original penal views of every rude nation. The germ of Penal Legislation springs from a dim perception of a national duty to avenge a wrong done. Once performed, this duty becomes a precedent for further judgment and legislation, and increases in strength in proportion as a rude sensual nation sees retributive

[1] "Little is known regarding the Penal Law of the Greeks."—MITTERMAIER. This statement of our learned author is confirmed by the omission of the general topic and the scantiness of particular statements in Mr. Grote's celebrated *History of Greece*.

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justice realized by executions, while the delusion is confirmed by the mystical notion that blood must be expiated by the blood of the manslayer. Hence we find in the twelve tables of the Romans (No. 8), the retaliating enactment:—*Si membrum rupit, ni cum eo pacit, talio esto.*[1] The word "vindicta" for punishment points equally to revenge and retaliation. Under the influence of such motives, Capital Punishment, as an act of retribution, is easily justified.

2. *Belief in the necessity of criminal law as a deterrent.*—The second fundamental idea of ancient Penal Legislation—viz. its function as a deterrent—accords with a low state of civilization, in which man's moral nature is not appreciated, and in which fear of physical suffering appears to the lawgiver to be the only feeling to which he can appeal. Hence, in such times, chastisement, maiming, and capital punishment, seem suitable and lawful penalties.

3. *The notion of making atonement to an offended deity.*—The third idea is that of atonement. The deity of primitive nations is irascible, and being a creation of man's mind partakes of his attributes. The deity is offended by the sins and crimes of mortals, chiefly by those in which he is more immediately concerned—as, for instance, by any act implying contempt or even indifference towards his symbols, his priesthood, or institutions or property devoted to his service. He is prone to avenge himself on a nation for the misdeeds committed by any of its members. The whole national sacrifice is rendered distasteful to him by the mere presence of the

[1] Aulus Gellius: *lib.* 20, *cap.* i., 5.

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obnoxious person. No better subject for conciliating his anger and expiating the national sin can be chosen than the person of the offender. This was besides a sacrifice that perfectly suited the theocratic views of the early Romans.

The offences against fellow-men and citizens were soon esteemed to be offensive to the deity, and had to be expiated in a similar way as those by which he himself was hurt, as it were, in his own person. Whosoever, even through mere inadvertence, killed a man, was compelled to offer sacrifices, and to perform certain expiatory ceremonies.

This explains the use of the word *supplicium* (act of supplication or worship) for Capital Punishment, the people appealing through it to the mercy of the offended protecting *numen*, and endeavouring to conciliate him by the death of the guilty person. Conformably to the theocratic bias of the early Romans, a verdict of outlawry was pronounced by the formula "*Sacer esto*," which excluded the outlaw from the political commonalty, so that whoever slew him was, on that account, liable to no penalty.

Concurrently, however, with the formation of the Republic, honour and freedom were better appreciated, and Capital Punishment was looked upon as no longer befitting a free citizen, but only adapted for slaves and the dregs of the population. Accordingly, the punishment of death was repealed by the *lex Porcia*, and milder penalties were introduced.[1] But as, by degrees, the dignity of republican views was lowered, and ancient Roman *virtus* (manhood) degraded, Capital Punishment

[1] Lex Porcia, *vide* Appendix A.

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came into use again, until, as civil and political rights disappeared, and the *aquæ et ignis interdictio* had lost its formidable significance, the punishment of death became the rule for all great crimes, and was often, through the whim of a half-witted Emperor, or the spiteful fit of one of his contemptible minions, inflicted even upon the most worthy persons.

Christianity, which ultimately became the most important element in the German world, had, at the outset, no mitigating influence in Rome, or, at any rate, effected no repeal of Death Punishment. The contentions amongst the converts, the complete moral depravity of the Romans, and the character of Constantine, who was unable to understand the essence of the new faith, account for this defect. These causes prevented Christianity from producing a moral revolution. Its spirit was not understood, and hence it was in some cases even abused as a pretence for increased cruelty; this was especially the case with regard to the legislative menace of Capital Punishment.

Wherever Christianity was understood in its purity, it failed not to exercise its benign influence on the life of nations. The Fathers soon conceived and propagated a new idea regarding the Deity, which was almost the converse of that entertained by the ancients; the irritated wrathful *numen* being replaced by a loving father desirous of seeing his erring children reformed. Hence the contentions of the Fathers against the heathenish principles of slavery and gladiatorial exhibitions, and their verdict against Capital Punishments.[1] Popes and

[1] *Vide* St. Augustine: *Epist.* 152, 154.

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priests were actuated by the same spirit in their endeavours to convert the Teutonic nations to Christianity, and spoke out boldly against the injustice of the rack and Capital Punishment. In conformity with canonical views, Penal Legislation had to look upon crime as an offence against the public interest, not as was the case before, against the aggrieved party. Hence there arose a sense of great clemency in place of previous vindictiveness.

It was laid down by a Council[1] that the object to be attained by punishment was the correction of the culprit. The history of Saint Bernard teaches us how, in the Middle Ages, worthy clergymen opposed, with all the weight of their influence, Capital Punishment, on the plea that it was antagonistic to the spirit of Christianity. In order to raise a barrier to its execution, the institution of "Sanctuary" was founded, its original intention being to protect those who might seek refuge in a place environed by ecclesiastic peace against the pursuit of accusers, who, after the fashion of those times, were actuated by revengeful feelings, heedless of right and justice. It never was the intention of those who established this means of protection, to screen the guilty person from the punishment which he deserved, although it must be admitted that the privileges of "Sanctuary" were often abused. It is, however, certain that the Church, by means of "Sanctuary," made an effort to withdraw culprits from Capital Punishment. Accordingly, there are a great many covenants and agreements extant stipulating that the extradition of

[1] *Concilium Toletanum in Mansi Concil.*, vol. xi. p. 141.

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the fugitive should be granted, with the proviso that, even if convicted, he should not be capitally punished. It has indeed been asserted, but it cannot be proved, that the Canon Law justified Capital Punishment.

In Germanic law, according to the earliest records, Capital Punishment is met with, but this extreme measure was considered of so exceptional and extraordinary a nature, as to be justifiable only by an express order of the Deity. So long as vengeance for blood and the system of compensation which followed prevailed, there was little occasion for carrying out the extreme penalty. Still, according to the peculiar Germanic view of the subject, Capital Punishment might be justified on the ground that peace was the essential basis on which the law of the nation is founded. He who is guilty of certain crimes breaks the peace, forfeits his right to protection, and becomes, in short, an outlaw.

The punishment of death has been more in use with some nations than with others: it was especially resorted to by those who were connected with the Romans, and had imported into their legislative systems that portion of the Roman code. We find, for instance, traces of Roman influence in many of the enactments of Charlemagne's *Capitularia*. Besides, there is the idea of talion in the German law which, as has been already remarked, is met with in the legislative system of every rude people.[1]

It must here be noticed, however, as an important fact, that after the conversion of the Germanic nations

[1] Vide *Anglo-Saxon Law*, especially *Leges Ælfredi*, c. 19.

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to Christianity, the Church exercised a beneficial influence in favour of the abolition of Capital Punishment. The clergy exerted themselves to their utmost in order to make correction the main object of punishment, and consequently resisted enactments which had for their aim the forfeiture of life. Hence redemption was permitted even in crimes of blood involving Capital Punishment, with the proviso that the culprit should do special penance. He and his family were required to pledge themselves that they would perform certain acts of a humiliating nature in public, as a proof of their repentance—either in the form of erecting monuments in honour of the Church, or of undertaking a pilgrimage attended with some special hardship.[1] Although the sentence of death was legally pronounced, Capital Punishment was often remitted, the mere menace of the law being in those cases considered a maximum penalty. At the same time, we find that the sheriffs had the power of substituting a lighter penalty than the one pronounced against the culprit. Indeed, those functionaries had the power vested in them of granting a complete pardon, and substituting mercy for justice.[2]

During the Middle Ages, there was a conflict of opinion with regard to Penal Legislation, especially in Italy, where authors of great repute endeavoured to prove the injustice of Death Punishment. Nevertheless, we find that towards the close of the fifteenth and the

[1] In a recent German periodical, *Das Germanische Museum*, 1861, No. 19, we find portions of a "Dresden Diary" from 1432 to 1463, in which pilgrimage to Rome is mentioned as a penalty for homicide.

[2] *Gnade für Recht ergehen zu lassen.*

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beginning of the sixteenth centuries, the number of executions increased, the intention of deterring subjects from the commission of crime being the ruling motive of Penal Legislation. From the statements of executioners extant, there is no doubt that the majority of the cruelest sentences pronounced against criminals were carried into effect. Appointed judges took the place of sheriffs elected by a constituency; these sheriffs were, by degrees, robbed of their authority; until the privilege which they possessed of substituting mercy for justice sank into desuetude.

The threat of Capital Punishment is very frequently employed in the *Constitutio Criminalis Carolina*, published in 1532. But the impartial inquirer will admit that this code went a long way to diminish the number of Capital Punishments. In Article 104, for instance, the infliction of the extreme penalty is directly opposed, while other articles, as, for example, 109 and 159, render it competent for the judges to inflict death only as a maximum penalty for the gravest crimes. The power thus vested in them of pronouncing milder judgments under extenuating circumstances, paved the way for the introduction of a graduated scale of punishments and the mitigation of the entire Penal Code.

It is true that in the Penal Laws of the sixteenth and seventeenth centuries, the punishment of death is frequently threatened, and that a spirit of stern severity pervades the authors of those ages regarding penalties in general. The religious and political commotions, the civil and external wars of the time, which rendered the people rude and obstinate, and produced grave crimes, amply account for this severity. Gangs of robbers, despe-

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rate and outrageous in the extreme, were frequently met with.[1]

Under these circumstances, the legislators considered great severity to be indispensable. They were, besides, actuated by party feeling, and saw in the stringency of penalties, in frequent recurrence to Capital Punishment, a means of frightening or exterminating their adversaries.

We shall conclude this chapter by briefly referring to two speculative writers on Penal Legislation—Sir Thomas More and Thomas Hobbes. They were both Englishmen distinguished for the high position they occupied, and the great abilities they possessed. They were separated from each other by a long interval of time, and expressed opinions still farther apart on the subject under discussion.

Sir Thomas More, Lord High Chancellor of England during the reign of Henry VIII., was a man of rare talents and accomplishments. He united gentleness of manners with decision of character, the suppleness of a courtier with the severity of a judge. He was for a long time the favourite counsellor of Henry VIII., who finally acknowledged his services by putting him to death on the scaffold. He was the friend of Erasmus of Rotterdam, who speaks of him, after his execution, with deep melancholy and great reverence. He was one of the few who are looked up to with admiration by their contemporaries, and remembered by posterity as models worthy of imitation.

In his work, *De Optimo Statu Reipublicæ deque*

[1] Hence, in England, under the reign of Henry VIII., Capital Punishment was inflicted in a cruel manner.

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Nova Insula Utopia, the first edition of which was published in 1516, he lays down the broad principle, that penalties ought to be proportionate to the offences, that severity of punishment misses its object, and that Capital Punishment, except in a few well-defined cases, ought never to be inflicted.[1]

Thomas Hobbes, the philosopher, took an entirely opposite view of the subject. In the *Leviathan, or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*, the first edition of which was published in 1651, he treats of penalties generally, including Capital Punishments. The change of opinion on the subject which had taken place in the interval between the publication of these two works, is indicated with greater emphasis than any words, however forcible, can express by the trials and executions of 1587 and 1649! Thomas Hobbes wrote his work in the midst of actual warfare, when the criminal was considered as an enemy of the State, and when Capital Punishment was looked upon as an act of self-defence on the part of the Commonwealth.

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[1] *Vide* Appendix B.

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CHAPTER II.

HUMANITARIAN DOCTRINES: THEIR BEARING ON THE THEORY OF CAPITAL PUNISHMENT.

THE Reformation undermined faith in authority, and roused the spirit of inquiry. But before this inquisitive spirit was applied to the principles of Legislation in general, and of Penal Legislation in particular, the political structures of ancient empires had to be shaken to their foundations; wars, both foreign and domestic, of the most devastating character, had to be waged, and the views of mankind on Criminal Law entirely revolutionized.

The first impulse to this movement was given in England. The two tempests of 1649 and 1688 purified the atmosphere. They tore up by the roots and cast aside prejudices of the most inveterate kind. Whilst this was being done in England, we find that in Germany the princes were holding the people with a firmer grasp. The nation was being crushed to atoms, and the power of united action destroyed.

Those who have carefully studied the growth and development of a single legislative principle or idea, from its first germ until it is embodied in a legal enactment, must have been struck with its slow and almost imper-

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ceptible progress. This is easily accounted for. The human race, in their collective capacity, are always engaged in working out the practical solution of many problems at the same time. Even the theoretical inquiry into the principles of legislation does not take place until it is called forth by the growth and development of the nation. This accounts for the fact that in Germany even Leibnitz, with his universal and comprehensive genius, never inquired into the history, principle, and object of Penal Legislation. He was by no means an indifferent spectator of historical events or the policy and fate of his own country. In order to divert Louis XIV. from his intended encroachments on the liberty and political existence of other nations, he personally suggested to that monarch a plan for the conquest of Egypt—a plan which, after the lapse of a century, Napoleon I. attempted to carry out. And besides his manifold scientific inquiries, Leibnitz conducted long and protracted negotiations with Roman Catholic divines, particularly Bossuet, the famous French bishop and councillor of State, for reconciling Roman Catholicism with Protestantism—a project which may be taken up again after the lapse of another century. Besides, he wrote a history of the House of Brunswick, in order to pave the way for his Sovereign, the Elector of Hanover, to the throne of Great Britain. But how far justice was realized, civilization advanced in the history, or the then existing enactments of the Penal Law of Germany or other countries, seems never to have occupied the mind of this great thinker.[1]

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[1] *Vide* Note at the end of this Chapter.

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England was the country which gave the first impulse to speculations on the principle and object of Penal Legislation; but it was by French, and not by English authors, that the subject was first broached. Those French authors of eminence who came to England in Queen Anne's time, especially Voltaire and Montesquieu, could not but be struck with the working of the Constitution, and that well-preserved inheritance—national self-government—which conquered the Stuarts, survived the tempests of the Commonwealth, the Restoration, and the Revolution of 1688. Voltaire and Montesquieu both lived in this country, both owed much to their personal intercourse with some of the great English statesmen of the time,—especially the Earl of Shaftesbury and Lord Bolingbroke,—both exercised a wholesome influence on reforming the Penal Legislation of their country, and enlightening mankind on the principles of Legislation in general.

Voltaire attacked with stern and fearless violence, with bitter satire, whatever he found or thought to be bad in the institutions of France, and stood forth an undaunted defender of those who had been unjustly condemned to death. He demonstrated with irrefutable logic that the prevailing severity of the Penal Law was not required by justice, and was a disgrace to his age.

Montesquieu, taking a higher aim, showed in that section of his justly celebrated work *De L'Esprit des Loix* which treats of Penal Law, and contains both a review of past, and a survey of contemporaneous Legislation, that severity has always missed its ends, and that punishments ought to be graduated in the same proportion as misdemeanors and crimes. It is true

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that he has not exhausted the subject, nor are his pithy concluding sentences—as, for instance, this one:—"Enfin tout ce que la loi appelle une peine c'est effectivement une peine"—free from paradoxical exaggeration; but he has, nevertheless, the great merit of having laid down in an impressive manner, that Penal Legislation, in order to attain its ends, must combine leniency in its enactments with certainty in their execution.

Returning to England, we must pay due homage to the practical philanthropy of our countryman, John Howard (born at Enfield, 1726; died in Turkey, 1790), who, with true British singleness of purpose and perseverance, devoted his life to the mitigation of the sufferings of his fellow-men. The portions of his philanthropic work in which we are at present most concerned are his endeavours to improve the condition of prisoners. The office of a gaoler had in process of time lost its character as a public service, and degenerated into a lucrative privilege. The gaolers were not paid by the State, and gradually acquired the right of obtaining payment from the prisoners themselves. In fact, the gaolers sold favours at a high price to all who were able to pay, or facilitated their escape from prison; whereas to the poor who had no *solatium* to offer, food of inferior quality — often quite unfit for human sustenance — was given. The prisons themselves, from an accumulation of filth, became hot-beds for fever and pestilence. One of the innumerable abuses was, that those prisoners from whom the gaolers thought they might be able to extort money were kept much longer in confinement than the sentence warranted. In

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fact, the prisoners were entirely in the hands of the gaolers. Parliament in emphatic terms expressed its thanks and those of the country to the great philanthropist, and soon after, the flagrant abuse was abolished by the "Howard-Popham Bill," which was passed June 2, 1774.

The published results of Howard's inquiries in England and other countries show that the abuses in the management of prisons were much more flagrant in England than elsewhere, because here alone the officials had perverted into a vested right and lucrative privilege what in its very nature is a responsible service, and ought to be kept under the severest control. But, on the other hand, Howard's life, and the results of his philanthropic endeavours, confirm the recognized fact, that in England every abuse has at last to yield to the energy of a persevering reformer, and that the inherent vitality of this State is great enough to admit of every reform being carried to its ultimate results, while the Commonwealth itself grows with increased vigour and renewed energy.[1]

Howard's contemporary, Jeremy Bentham, took a higher aim, and tended more directly to the mitigation of penalties, and the abolition of Capital Punishment.

Most of Bentham's works were first published in French, at the beginning of the present century, by his particular friend M. Dumont; but from the preface of one of these books we learn that the manuscripts from which *La Théorie des Peines* was taken were written as early as the year 1775.

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[1] *Vide* Appendix C. for Mr. Thomas Carlyle's estimate of Howard.

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In order to do justice to Bentham's views we have, however, only to refer to those of his works which were published by himself. These are *The Rationale of Punishment*, published in London, 1830, and *Jeremy Bentham to his Fellow-Citizens of France on Death Punishment*, published in London, 1831.

In *The Rationale of Punishment* he endeavours to strike a balance between the good and bad qualities of Capital Punishment as a penalty, under the following heads :—

"I.—Advantageous Properties of the Punishment of Death.

"1. It takes from the offender the power of doing further injury.

"2. It is analogous to the offence in the case of murder—but there its analogy terminates.

"3. It is popular in respect to that crime, and that alone.

"4. It is *exemplary* in a higher degree, perhaps, than any other species of punishment.

"II.—Desirable Penal Qualities which are wanting in Capital Punishment.

"1. The punishment of death is not *convertible to profit;* it cannot be applied to the purpose of compensation. In so far as compensation might be derived from the labour of the delinquent, the very source of the compensation is destroyed.

"2. In point of *frugality*, it is pre-eminently defective."

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Bentham considers the life of an individual as an element of wealth and strength to the community to which he belongs, and accordingly his death as a loss. This objection to Capital Punishment, however, is greatly weakened by the consideration that the criminal is in this respect of less value to the community than an average man, or of no value at all; in the latter case his death would not be a loss.

"3. *Equability* is another point, and that a most important one, in which the punishment is eminently deficient. To a person taken at random, it is, upon an average, a very heavy punishment, though still subject to considerable variation. But to a person taken out of the class of first-rate delinquents, it is liable to still greater variation. To some it is as great as to a person taken at random; but to many it is next to nothing.

"4. *Variability* is a point of excellence in which the punishment of death is more deficient than in any other. It subsists only in one degree.

"5. *The Punishment of Death is not remissible.*"—No infallible system of jurisprudence having yet been devised, no test for the evidence of witnesses having yet been laid down to render testimony equally conclusive for proving a fact, an action, or an intention, as a mathematical proof for a given proposition. Error is possible in all judgments. In every other case of judicial error, compensation can be made to the injured person. Death admits of no compensation.

In a foot-note to this head, Bentham states another defect of Capital Punishment, which appears of sufficient importance to form a distinct head by itself. It

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is, in fact, so momentous an objection, that we think it necessary to transcribe the paragraph *in extenso* :—

" There is an evil resulting from the employment of death as a punishment which may be properly noticed here. *It destroys* one source of testimonial proof. The archives of crime are, in a measure, lodged in the bosoms of criminals. At their death, all the recollections which they possess relative to their own crimes and those of others perish. Their death is an act of impunity for all those who might have been detected by their testimony, whilst innocence must continue oppressed, and the right can never be established, because a necessary witness is subtracted.

" Whilst a criminal process is going forward, the accomplices of the accused flee and hide themselves. It is an interval of anxiety and tribulation. The sword of justice appears suspended over their heads. When his career is terminated, it is for them an act of jubilee and pardon. They have a new bond of security, and they can walk erect. The fidelity of the deceased is exalted among his companions as a virtue, and received among them, for the instruction of their young disciples, with praises for his heroism.

" In the confines of a prison, this heroism would be submitted to a more dangerous proof than the interrogatories of the tribunals. Left to himself, separated from his companions, a criminal ceases to possess this feeling of honour which unites him to them. It needs only a moment of repentance to snatch from him those discoveries which he only can make; and without his repentance, what is more natural than a feeling of vengeance against those who cause him to lose his

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liberty, and who, though equally culpable with himself, yet continue in the enjoyment of liberty? He need only listen to his interest, and purchase, by some useful information, some relaxation in the rigour of his punishment." [1]

Besides, another defect of Capital Punishment as a penalty, which follows from its not being remissible, is, that it may be used by men in power to gratify their passions by means of a corruptible judge. "In such cases," as Bentham says, "the iniquity covered with the robe of justice may escape, if not all suspicion, at least the possibility of proof. Capital Punishment, too, affords to the prosecutor as well as to the judge, an advantage that in all other modes is wanting: I mean greater security against detection, by stifling by death all danger of discovery arising from the delinquent, at least; while he lives, to whatever state of misery he may be reduced, the oppressed may meet with some fortunate event by which his innocence may be proved, and he may become his own avenger.

"A judicial assassination, justified in the eyes of the public by a false accusation, with almost complete certainty assures the triumph of those who have been guilty of it. In a crime of an inferior degree, they would have had everything to fear; but the death of the victim seals their security." [2]

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[1] Bentham on *The Rationale of Punishment*, p. 186.

[2] It is only to be feared that the man in power, after having imprisoned the obnoxious individual, will know how to dispose of him, even without having recourse to Capital Punishment. How, if it could be shown that within the last ten years several men, who might have been dangerous witnesses against men in power, died in prison under highly suspicious circumstances!

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"The objection arising," says our author, "from the irremissibility of the punishment of death applies to all cases, and can be removed only by its complete abolition."[1]

After striking the balance between the good and evil qualities of the penalty, Bentham arrives at no decisive and definite conclusion; or, to speak more exactly, he arrives at various conclusions by no means consistent with each other. He says (page 193) that there is only one case in which Capital Punishment is necessary—namely, that of rebellion against Government.[2]

But by subsequent consideration he weakens and almost annihilates his argument again; and to the reasons by which he effects this another could be added,

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[1] *The Rationale of Punishment*, pp. 189-90.

[2] "In fine, I can see but one case in which it can be necessary, and that only occasionally: in the case alleged for this purpose by M. Beccaria—the case of rebellion or other offence against Government of a rebellious tendency, when, by destroying the chief, you may destroy the faction. Where discontent has spread itself widely through a community, it may happen that imprisonment will not answer the purpose of safe custody. The keepers may be won over to the insurgent party, or, if not won over, they may be overpowered. They may be won over by considerations of a conscientious nature, which is a danger almost peculiar to this case; or they may be won over by considerations of a lucrative nature, which danger is greater in this case than in any other, since party projects may be carried on by a common purse.

"What, however, ought not to be lost sight of in the case of offences of a political nature is, that if by the punishment of death one dangerous enemy is exterminated, the consequence of it may be the making an opening for a more formidable successor. 'Look,' said the executioner to an aged Irishman, showing him the bleeding head of a man just executed for rebellion: 'Look at the head of your son!' 'My son,' replied he, 'has more than one head.' It would be well for the legislator before he appoints Capital Punishment, even in this case, to reflect on this instructive lesson."—*The Rationale of Punishment*, pp. 193-94.

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which seems weightier than any of his, viz., that a government supported by a small minority, of either subjects or citizens, as the case may be, has no right to sacrifice human life in order to maintain itself.

Bentham proposes (p. 195) that Capital Punishment should be confined to that class of the community from which the legislators are taken. And on the following page (p. 196), he proposes to confine Capital Punishment to the gravest offences—to murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients by which it may be made to assume the most tragic appearance may be safely resorted to in the greatest extent possible, without having recourse to complicated torments.[1]

But no wavering, no uncertainty, no want of decision are met with in the second treatise, viz., his address, published under the title: *Jeremy Bentham to his Fellow-Citizens of France on Death Punishment.* London, 1831. In this address in page 2, he says:—

"Now, then, as to this same question. The punishment of death, shall it be abolished? I answer, *Yes.* Shall there be an exception to this rule? I answer, So far as regards subsequential offences, *No*—meaning by subsequential, an offence committed on any day subsequent to that which stands appointed by the law as that after which no such act of punishment shall be performed."

Justice requires us to say that, whatever may have been the inducement which made Bentham at the date

[1] *The Rationale of Punishment*, p. 196.

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of this address a decided advocate for the abolition of Capital Punishment, it was certainly not the ambition of the demagogue, who, in order to further his own selfish designs, flatters the popular passions of the day.

The leaders of the French popular party after the Revolution of 1830, desired that exemplary—that is, capital — punishment should be inflicted upon the advisers of Charles X. The defenders of these Ministers —Villele, Peyronnet, Polignac—in order to ward off the danger, proposed that Capital Punishment should be abolished. Although legally a new law could avail nothing for men who had committed offences before it came into operation, still there would have been an important point gained for the ex-Ministers, if the punishment of death had at that time been abolished. Their defenders would in that case have had much greater chance of success. Whosoever, under these circumstances, proposed the abolition of Capital Punishment, as Jeremy Bentham did, exposed himself courageously to the enmity of the popular leaders, and certainly was by no means their vile and selfish flatterer.

Jeremy Bentham died more than thirty years ago, but no impartial judgment has yet been pronounced on the man or his works. The most of those who know anything of him follow either in the wake of his blind admirers, or take the aspersions of his slanderers for granted. Those who follow tradition as their guide, take the term utilitarianism as a true and proper designation for Bentham's philosophical and political system. They have no hesitation in denouncing him as a shrewd and thoroughly selfish fellow. That

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such men should take the trouble to learn that the term utilitarianism was not invented by Bentham himself, but by his enemies, can hardly be expected. But whether or not the word is appropriate as a general expression of Bentham's system, one thing is certain, that few men have been less guilty of low selfishness than Jeremy Bentham. His very faults show that, on the contrary, he was a man of benevolence and generosity.

In our opinion, at least, the fundamental defect in Bentham's system consists in his regarding "the greatest happiness of the greatest number," or, as in other passages he still more pithily expresses it, his "greatest happiness principle," as the ultimate aim and end of all government. But let a State be as democratically constituted as it may, the number of its rulers, the legislative assembly included, is certainly a small minority of the citizens. In order to carry out Bentham's plan, this small minority would have to decide in the name of all what their greatest happiness is, and to regulate all public affairs according to this standard. But the individual's standard of happiness being various and manifold, and the very essence of freedom consisting in the individual right of every one to form a standard of happiness for himself, and to shape his conduct accordingly, provided that no individual is allowed to encroach upon the personal sphere of another, it necessarily follows that Bentham's "greatest happiness principle" would turn out to be the foundation of the most unbearable despotism.

Limiting ourselves to Bentham's works on Penal Legislation, we have a few objections to offer.

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1. He is wanting in due respect to man. Our meaning will be best illustrated by the quotation of a single sentence:—

"Constantine prohibited by law the branding criminals on the face, alleging that it is a violation of the law of nature to disfigure the majesty of the human face—the majesty of the face of a scoundrel!"[1]

The author might have spared himself the trouble of writing many painful chapters of his work if he had admitted that mutilating, disfiguring, defacing the human form, must be excluded from the Penal Code of every civilized nation.

Mr. Grote, in his history of Greece, already referred to, has laid it down as one of the chief characteristics of the Grecian mind that mutilation of the person, both in warfare and as a penalty, was "not only not practised, but considered unseemly among non-Hellens." And in our days, public opinion, whose silent growth and wholesome influence is much underrated both by Bentham and some living authors, would stamp that legislator with the indelible stigma of a barbarian who would vote for legalizing the infliction of such penalties.

2. Our second objection to Bentham's proposed Penal Code refers to his introduction of sham punishments. As an illustration of our meaning, we again quote from *The Rationale of Punishment*. After recommending as penalties for deceit or forgery transfixing the hand or tongue of the culprit, he goes on to say:—

"These punishments may be made more formidable in appearance than in reality by dividing the instrument

[1] *The Rationale of Punishment*, chap. x, p. 73.

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into two parts, so that the part which should pierce the offending member need not be thicker than a pin, whilst the other part of the instrument may be much thicker, and appear to penetrate with all its thickness."

Such a *ruse* would, however, soon prove quite useless, for the true extent of the injury inflicted could not be kept secret; and when the actual amount of the injury became known, greater harm would be done to public morality by this want of truthfulness in a legal act than good could be expected from the magnified appearance of the injury. A lawful penalty must be a reality and not a sham.

But after mentioning these defects, it is only fair to acknowledge that Bentham's works on Penal Legislation afford proofs of great learning and penetration, solidity of judgment, and activity of mind. He has paved the way for reformers by throwing the light of his criticisms on many abuses and prejudices. But of his proposed penal arrangements, nothing has been so generally introduced as solitary prisons, called by Bentham "Panopticons." Observation and experience have already shown that such arrangements are almost indispensable where the reformation of the criminal is an object in the penalty inflicted. But the final verdict on the value of solitary confinement has not yet been pronounced.

No man has devoted himself with greater energy to the mitigation of our Penal Code than Sir Samuel Romilly. The difficulties he had to contend against in order to carry through Parliament the Bill for the abolition of Capital Punishment for picking pockets to the amount of five shillings may be learned by our readers from his memoirs or from the annals of our

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Penal Legislation. It is, however, a significant fact that the House of Commons, in 1808, forced upon him the omission of the following preamble to that Bill:— "Whereas the extreme severity of Penal Laws has not been found effectual for the prevention of crimes; but, on the contrary, by increasing the difficulty of convicting offenders, in some cases affords them impunity, and in most cases renders their punishment extremely uncertain"— and that of four successive Bills for the mitigation of punishment, only one passed the House of Lords, in which Lords Eldon, Ellenborough, and Sidmouth, were the jealous Conservative guardians of the Constitution and the sanctity of the Criminal Code. After Sir Samuel's lamented death, in 1818, Sir James Mackintosh followed in the same path of mitigation, with almost equal devotedness, and had to contend with Herculean labour against opposition and difficulty. Meanwhile, Thomas Fowell Buxton, the brother-in-law of Mrs. Fry (of well-deserved fame for her efforts to mitigate the sufferings of prisoners), assisted her valiantly in her endeavours, and published, in 1818, his *Enquiry whether Crime and Misery are produced or prevented by our present System of Prison Discipline?*

It was a hard struggle indeed. The abuses in the administration of our gaols, the draconic severity of our Penal Legislation, did not yield to the efforts of one, but demanded the perseverance of several generations of reformers. While by the suspension of cash payments the promissory notes of the Bank of England for more than twenty years were forced upon the nation as legal tender, and thereby the price of commodities raised to an unknown height—while the shipping in-

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terest was protected by the navigation acts—the landed interest by the corn bills, and almost every manufacturing interest enjoyed its particular protection—a policy which most effectually diminished the foreign demand for English produce, and tended to reduce the workmen to starvation—our Government saw no effective remedy against the daily increasing spirit of discontent save by maintaining the full severity of our Penal Code.

And still more were they hardened in their obstinacy when the discontentment brought about by hunger was increased by the harangues of political agitators, who pointed to reforms in the representation of the people as the only effective panacea for all evils. The great majority in both Houses of Parliament obstinately defended the severe enactments of our Penal Law, although they might have learned at every sitting of the assizes, and almost in every single trial, that this unpopular severity rendered these enactments inoperative and became an insurance of impunity for by far the greater number of culprits. The fact that severity was injurious to the public interest was not allowed, as we have seen in Sir Samuel Romilly's case, to be recorded in our Parliamentary Acts. But the stern reality was not abolished by the affected blindness of our legislators. And so deep-rooted is inveterate prejudice, that even long after the Reform Bill was carried, a Whig Ministry, and a prominent reformer in this Ministry, obstinately resisted the due limitation of Death Punishment. When Lord John Russell's Bill to reduce the number of capital offences was being considered in committee on May 19, 1837, Mr. William Ewart moved

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an amendment confining the penalty of death to the single case of deliberate murder. The Ministry resisted and carried the original Bill by a majority of one vote. When brought before the House of Lords, Lord Brougham observed that nothing but pressure of time prevented his endeavouring to amend the measure by extending the remission of the Death Penalty to all crimes except that of murder; and his lordship did not know that he should venture to except that—so convinced was he that Capital Punishment tended to the increase of crime and to the impairing of justice.[1]

No better proof can be given that a legislative measure has fairly taken hold of the public mind—no more effective means can be devised for carrying a lawful purpose into effect—than the formation of a society.

The Society for the Abolition of Capital Punishment was founded in 1828, under the patronage of the Duke of Sussex, by Messrs. J. Sydney Taylor, W. Allen, Peter Bedford, J. Thomas Barry, Sir Fowell Buxton, and the Right Hon. Dr. Lushington. Through their instrumentality petitions have been presented to both Houses of Parliament. On May 24, 1830, a petition, signed by upwards of a thousand bankers of Edinburgh, Dublin, Manchester, Liverpool, &c. &c. [the list comprises 233 towns], was presented to the House of Commons by Henry Brougham. The petition contained the following remarkable statement:—

"That your petitioners find by experience that the infliction of death, or even the possibility of the in-

[1] *Vide* Miss H. MARTINEAU'S *Our Thirty Years' Peace*, Bk. v. ch. xiv.

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fliction of death, prevents the prosecution, conviction, and punishment of the criminal, and thus endangers the property which it is intended to protect."

In consequence of this and other petitions to Parliament, Death Punishment for forgery was abolished.

In connection with this part of our subject we must refer our readers to the second report of the Royal Commissioners on Criminal Law, 1836.

Although in reviewing the progress of opinion with regard to Penal Legislation, we here give a prominent place to England, and have brought down our historical survey near to the present time, it must not be implied that other countries have been altogether indifferent to the subject. In fact, it appears from our short account of Bentham's career and writings, how closely English views on this subject were related to those of France, and to what extent the ideas expressed in either country obtained influence in the other. Most of our readers will admit that this steadily increasing mutual influence of European nations upon each other is one of the prominently characteristic features of our age.

The philosophy of Penal Legislation has in no country been more carefully investigated than in Italy. Cesare Bonesano de Beccaria [born 1738: died 1794] wrote and published [first edition anonymously, Monaco, 1764,] his celebrated and influential work, *Dei Delitti e delle Pene*. We learn that he was a member of a society of men of letters at Milan, who edited a periodical, *Il Caffé*. The judicial murder of Calas, at Toulouse, caused at that time an European sensation; one of the French authors, who, as editors of the great *Encyclopédie*, were afterwards styled "Encyclopedists," is said

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to have written to a member of the Milan literary society: "Now is the time to rise against religious intolerance and the exaggerated severity of Penal Legislation."

Most of the members of the literary club were struck with this idea, and, before all others, Beccaria, who, a zealous reader of French authors—especially Condillac, Helvetius, Montesquieu—was induced to write his work *Dei Delitti e delle Pene*, which afterwards made him famous, and up to the present time has been considered one of the most important treatises on Penal Legislation. In a letter written prior to the publication of this book, which Morellet, the French translator of Beccaria, has preserved, this author says of himself that he was mainly actuated by three sentiments—viz., love of literary fame, love of liberty, and compassion for the unhappy condition of mankind, who were enslaved by many errors.[1]

Beccaria's work was not intended to be a complete system of Penal Law, but was mainly directed against the most flagrant errors and abuses of contemporaneous legislation. The author insists particularly on abolition of punishment of death and abolition of torture. The wide circulation which this work obtained, the fame and influence which have attended it, justify us in giving a short analysis of the chapter relating to Capital Punishment:—

The right to punish which is vested in the sovereign

[1] Che studiando in pace la filosofia, accontentava tre sentimenti ch'erano in lui vivissimi, cioè l'amore della riputazione letteraria, quello della libertà, e la compassione per l'infelicità degli uomini schiavi di tanti errori.

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is founded on the interest that everybody has in the maintenance of justice. Justice is defined to be the bond which unites the interests of individuals for mutual protection—perpetual warfare of everybody against his neighbour being the natural consequence of an isolated state. The power of dispensing justice is vested in the sovereign. In order to constitute this power every man was required to surrender a portion of his liberty—especially a portion of those rights which regard his own person. "The aggregate of these, the smallest portions possible, forms the right of punishing; all that extends beyond this, is abuse, not justice."

The small portion of his liberty which every individual is supposed to have ceded to the sovereign cannot include the right to dispose of the individual's life. Besides, the end professed to be aimed at by Capital Punishment can be better attained by less violent means.

For the death of a citizen cannot be necessary, save in one case, when, though deprived of his liberty, he is still powerful enough, through his connections, to endanger the security of the nation. But such a state of things supposes complete anarchy, in which the arbitrary will of individuals supplants law. Such an exceptional state of things may require exceptional remedies, may justify extraordinary energy, and even violence exerted by single individuals; but laws are given for a state of tranquillity, and in these happier times there can be no necessity for taking away the life of an individual.

The author then asserts that it is not the intensity of a pain which produces the greatest effect on the mind of man, but its continuance, and thereby implies that in his view the main object of punishment is to operate as

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a deterrent on those who are likely to commit the offence for which the punishment has been inflicted. As a deterring example, the execution of a culprit lasts only a short time; whereas, by perpetual slavery (Beccaria's mode of punishing the greatest crimes), every criminal affords a frequent and lasting example.

He then meets the objection: perpetual slavery is as painful a punishment as death, and the sovereign has accordingly just as little right to inflict the former as the latter punishment. His answer is, that perpetual slavery might be even a greater evil than death, if it were possible to concentrate in one point all the miserable moments in the life of a slave. But these miseries being spread over a long period, while the pain of death is confined to a moment, makes slavery by far the milder of the two modes of suffering. Besides, habit exercises its mitigating influence by rendering the culprits callous, and hope, this cheering companion of mortals, by flattering visions of a brighter future. Accordingly, slavery is in reality a milder punishment than it appears to be to the spectators, who estimate the privations of the slave without taking into account the alleviating influences.

Another objection to Capital Punishment is the example it affords of barbarity. "If the passions or the necessity of war have taught men to shed the blood of their fellow-creatures, the laws which are intended to moderate the ferocity of mankind should not increase it by the examples of barbarity, the more horrible as this punishment is usually attended with formal pageantry."

But in enumerating Beccaria's reasons against the infliction of death, without giving an idea of his im-

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pressive style and his lively eloquence, we have only done half justice to the author of this book, which, in a large measure, owes its success and the diffusion of its principles to the animated style in which it appeals to the feelings of mankind—a success which has been even enhanced by the ingenuity and dexterity with which susceptibilities have been spared, and the existing powers flattered.

The work appeared in about thirty Italian editions, and was translated into most of the European languages. From 1767 to 1778 four editions of the English translation were issued in this country.

The work of another Italian—*La Scienza della Legislazione*, di Gaetano Filangieri—is remarkable in more than one respect. The author, third son of Cæsar, Prince of Arianelli, in the kingdom of Naples, was born in the year 1752. He was educated for the bar, and practised first as an advocate in the courts at Naples; afterwards, when by his family connections he obtained royal favour, he was appointed gentleman of the Chamber in 1777, and held besides a commission in the Royal Noble Guard.

After writing some essays on law and politics, he published, 1782, the first and second books of the *Scienza della Legislazione*, which were received with a burst of applause and soon reprinted in four subsequent editions. Whilst the author held high offices he was the favourite of his sovereign; whilst he carried into effect his vast plan of a general reform in the legislation of his country, being checked neither by favour nor persecution, he wrote his great theoretical work on the Science of Legislation, which, however, in the thirty-

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sixth year of his age (1788), he was, by death, prevented from completing.

No writer on the history of Frederick II. and Maria Theresa, no writer on the history of the French Revolution who desires to make himself acquainted with its causes and the events immediately preceding, can dispense with reading this book. There is one striking passage in the introduction which we think no reader of our day can peruse without being reminded of the gentle breeze which, after long sultry summer days, is the certain precursor of the coming storm; we mean the passage which alludes to the oration delivered by the Bishop of Aix before Louis XVI., on the day of his coronation.[1]

Not only on account of its author, and as an illustration of the history of its time, is the book remarkable, but it was besides "singular in its kind, and equally singular was its fortune. In the bosom of superstition, and in some degree of civil and religious slavery, it has run through no less than seven different editions. It has been twice published in the German language, has appeared in two French versions, has been translated into Spanish, and is at last naturalized in the happiest and freest government in the world."[2]

[1] The historian of the French Revolution will find the following passage all the more important because the author, who bears testimony respecting one of its forebodings, was at rest in his grave before the storm burst:—"Questo suddito coraggioso ardì di chiamare il suo Rè innanzi al tribunale della publica opinione, ricordandogli che questo tribunale dovrebbe un giorno giudicarlo; ed ebbe il coraggio di mostrargli in picciola distanza quel punto, nel quale finiscono i suoi dritti e cominciano i suoi indispensabili doveri." — *Sc. del. Legis.*, Milano, 1822. Vol. I., p. 9.

[2] Preface to the translation (1806) by Sir R. Clayton, who adds in

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The third book of the *Scienza della Legislazione* treats of Criminal Law, and is divided into two parts, of which the first refers to the procedure, and the second treats of crimes and punishments.

Filangieri differs from Beccaria with regard to the punishment of death, and opposes his reasoning without mentioning his name. Filangieri asserts that the sovereign has the right of inflicting Death Punishment, and attempts to prove his assertions in the following manner :—

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a foot-note,—"Mr. Kendall published a translation of the first volume of *La Scienza della Legislazione* in 1792, but gave up the idea of proceeding. I have confined the present translation to political and economical laws, and have not extended it to Criminal Legislation, since a great part of Filangieri on this subject relates to the local imperfections of the continental system of Criminal Jurisprudence, neither useful nor entertaining to an English reader." Those who remember what draconic severity prevailed in our Criminal Code at the time when this translation was published, will agree with us in thinking that Sir R. Clayton was mistaken, both in his Yankeelike praise of the English Government, and in his exaggerated laudation of English law. It is, however, meet to acknowledge that this translation, enriched, as it is, by many valuable notes exhibiting great learning and judgment, reflects credit on Sir R. Clayton. It is one of those books which have been too soon forgotten, and which ought to be found on the shelves of every lawyer and legislator. But the remark just quoted presents another proof of an observation made above. In spite of the prevailing defects of our Criminal Code, Sir R. Clayton was so much in love with that homespun legislation, as to think that nothing useful for England could be learned even from a theoretical work of foreign production. In our own day Naples, the hotbed of despotism and superstition, has, in merging into the kingdom of Italy, adopted our representative institutions, and distinguished English lawyers will not now disdain to learn from foreign authors. Careful observations on the operation of Penal laws and penalties—particularly solitary imprisonment — thoroughgoing theoretical inquiries on the essence of the right and object of punishing, would in these days certainly be welcomed by the leading men in the profession.

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Man in a state of nature has a right to his life. He cannot resign that right, but he can forfeit it by misdeeds, and he does forfeit it by a murderous assault upon his fellow-man.

In a state of nature no individual is appointed to perform special functions; consequently it is the right and duty of every man to punish the transgressor of natural laws, and everybody is justified in killing that individual who by his misdeeds has forfeited his life.

This natural right to kill the transgressor is by every individual transferred to the sovereign, and consequently vested in him so soon as the state of nature is transformed into a civil state. The right of the sovereign to inflict the punishment of death arises from this transference of the right of every individual to kill his neighbour—by no means from the cession of the natural right which every man has to his own person.

Those of our readers who are not conversant with the philosophy of Right, will be prone to take this reasoning of Filangieri as idle hair-splitting sophistry; but how can these champions of so-called common sense and sober matter of fact explain that in all civilized states, in respect to one case at least, impunity is granted to the perpetrator of intended homicide? No judge, no legally empanelled jury, will condemn a man for having killed his neighbour who assaulted him with murderous intent, provided that no other mode of saving his own life was possible. Common sense suggests no objection to such an absolving verdict; and Filangieri's theory justifies it by the assumption that man is allowed to return to his natural right whenever he finds it impossible to have recourse to the authority whose competency

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he recognizes by the very fact of his being a member of a community.

Filangieri does not advocate the abolition of Capital Punishment, but limits the infliction of death to a few crimes, viz., murder with intent after cold-blooded deliberation (a sangue freddo), treason, and high treason.[1]

The infliction of this penalty is to be accompanied with melancholy solemnity, but divested of all avoidable cruelty.

Before leaving Filangieri, we will quote one passage of his book, from which it will appear that he derives the right of punishing from the nature of man. He says (chap xxix. b. 3): "Those phenomena, which we term moral, those sentiments, those passions which manifest themselves in us unconsciously, are only so many links of the invisible chain which nature has made for great designs. Nature—to use an expression of Aristotle (*Respublica, Lib. I.*)—has special means for every special purpose, and we are enabled in some way to trace out one of her purposes by recognizing the corresponding means. What object, I ask, could our hatred have to the perpetrator of a crime which does not concern ourselves, our relatives, or friends? Which of us does not suffer from seeing a crime unpunished? Which of us does not rejoice when justice condems the perpetrator to his deserved punishment? Which of us, on hearing the narrative of an atrocious crime, would not wish to have in his own grasp the wretch who has committed it, in order to avenge the wrong done to the unfortunate man totally unknown to

[1] A colui che ha tradito la patria, che ha cercato di sovvertire la sua costituzione, che, in poche parole, si è reso reo di maestà in primo capo.

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us? To be sincere, we must confess that at such a time no motive of self-interest actuates us."

Although of these two Italian writers Filangieri had more learning and depth, Beccaria's treatise made a greater impression on his contemporaries, and had more influence on legislation.

Among the governments of Italy, that of Tuscany was most impressed with Beccaria's views. In harmony with the spirit of reform, characteristic of all his predecessors of the dynasty of Lorraine, Leopold, Grand Duke of Tuscany, reformed the legislation of his country. By the Code published 1786, he abolished punishment of death. The preamble of the act by which the Code was introduced asserts that no Capital Punishment had been inflicted in Tuscany for fourteen years before (1772), that severe punishments are productive of mischief; that the reformation of the criminal ought to be one of the main ends of justice; that the legislator ought never to despair of attaining this end; and that in Tuscany, at least, reformation was more certainly attainable by means of good prisons than by Capital Punishment, which the people of Tuscany detested.

It has been shown that the number of crimes has not increased since the abolition of Capital Punishment.[1] When, however, Leopold ascended the Imperial throne

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[1] MITTERMAIER und MOHL'S *Zeitschrift für Gesetzgebung des Auslandes*, II. Band, Nr. 20; Puccini, in the same journal, vol. xii., No. 14. Puccini was president of the Court of Cassation in Florence. He lived under Leopold, and assured the author of this book (1841) that, according to his experience, Capital Punishment is not justifiable, and that its abolition in Tuscany had no evil consequences.

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of Austria in 1790, riots broke out in some parts of the country, and presented the opportunity which the adversaries of reform had long desired. They succeeded in prevailing upon the Emperor to enact the law of 1790, by which Capital Punishment was re-introduced for riotous disobedience. The law of August 30, 1795, signed by the Grand Duke Ferdinand, was still more severe, and menaced certain crimes against religion, besides assassination, murder, infanticide, with Capital Punishment. The real cause of this retrograde legislation must be referred to the timid character of the Grand Duke, and the agitations both of a reactionary and a French revolutionary party. It is a remarkable fact that, according to trustworthy authorities, the number of capital crimes was not increased under the law of 1786; nor were such crimes committed by foreigners; whence it appears how unfounded was the fear that, after the abolition of Capital Punishment, foreigners would rush into that country where punishment by death was abolished, in order to commit murders. Even after the enactment of Capital Punishment, no execution took place, because of the indisposition of the courts of law to convict, and on account of the mercy which was granted to condemned criminals. We shall refer in another portion of this work to the subsequent legislation regarding Capital Punishment in Tuscany.[1]

[1] A report of the French Governor of Tuscany, published in Comte Sclopis' *La Domination Française en Italie*, Paris, 1861, p. 84, to the Emperor Napoleon I., states that in Tuscany, under the Grand Duke Leopold, who abolished Capital Punishment, the number of crimes committed was less by more than a half of the number of crimes committed under the King of Etruria, who caused severe punishments to be inflicted.

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The publication of Beccaria's work, and the abolition of Capital Punishment in Tuscany, encouraged, not only in Italy, but throughout the whole of Europe, the advocates of the abolition of Death Punishment, or, at least, its limitation to the gravest crimes. In Germany, the first example was set by Austria. The benevolent Emperor Joseph II. had his misgivings regarding the lawfulness of Death Penalty, but did not venture on its abrogation. He accordingly, in 1781 and 1788, gave orders in council that passed sentences should not be carried into execution without his special mandate. These orders in council were kept secret, in order not to weaken the deterring influence of the law upon individuals predisposed to crime. Very few executions took place after 1781, but Death Punishment was not actually abolished before the promulgation of the new Penal Code of April, 1787. The Emperor Francis II. re-enacted Capital Punishment, at first for high treason only (1796), but afterwards for many crimes, by the Code (Strafgesetzbuch) of 1803. The Emperor apologized, after his own fashion, for so doing, by a decree of the Court, October 29, 1803; he could not help, in the same decree, recognizing the fact that *the number of crimes committed had not increased since the abolition of Death Punishment;* but he considered it, nevertheless, necessary to threaten the penalty again, as a check on those criminals whose hardened disposition was manifested by the atrocity of their offences.

We reserve for a future portion of this work what we have to say respecting the subsequent fate of Death Punishment in Austria. The French Revolution, and the events arising from it, filled the rulers and states-

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men of the time with fear, and made them think that the menace of the severest penalties, especially Death Punishment, was alone sufficient as a deterrent from crime. In the Prussian Code, *Allgemeines Landrecht für die Königl. Preussischen Staaten*, published 1788, confirmed 1794, Capital Punishment is accordingly threatened for many, especially political, misdemeanors and crimes, in such a manner as to show that the legislator had no other object save that of deterring.[1]

The Penal Code of Bavaria also maintained Capital Punishment. Feuerbach, the author of this code, followed his own penal theory, according to which, in order to render the menace effective, the temptation to the grossest crime ought to be checked by the menace of the greatest evil—death.[2]

In France, Beccaria's ideas were received with applause by the French nation before the Revolution; but after 1790, Le Pelletier Saint-Fargeau, reporter of the Committees for Legislation and Constitution in the National Assembly, moved that punishment of death be abolished, with the solitary exception of those political culprits who had been declared rebels. Robespierre delivered a speech in favour of abolition, but the

[1] Landrecht, § 93, Tit. 20, enacts that the person guilty of high treason shall be executed with the severest and most horrible punishment of body and life [mit der härtesten und schreckhaftesten Leibes- und Lebenstrafe]. According to paragraph 805, the corpse of a suicide shall be duly executed, if, in the opinion of the judge, the act would operate as a deterrent.

[2] Paul Johann Anselm Ritter von Feuerbach, the celebrated criminal lawyer, was born 1775, and died 1833. He was the author of the Bavarian Penal Code (*Das neue Strafgesetzbuch für das Königreich Baiern*) published 1813. It has been adopted by several German Governments as a Penal Code.

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measure was lost by a majority of votes. After the execution of Louis XVI., which increased the number of those in favour of abolition, Condorcet, in the Convention, moved (1793) that punishment of death for all common crimes should be abolished. The speeches delivered on the occasion show that the disposition of at least a fraction of that assembly was not unfavourable to the motion. But the decree of the Year IV., enacting the abolition of Death Punishment, was rendered meaningless by the addition that the Act should not come into operation before the proclamation of general peace. Cruel sentences of transportation were substituted for Death Punishment until, December 29th, 1801, Capital Punishment was legally re-enacted. The Code Napoleon of 1810 ordains the extreme penalty for thirty-six crimes; the motives assigned for its imposition reveal the heartless cruelty of the Emperor. During the Restoration some good books were published, showing the unlawfulness of Death Punishment.[1] But a Minister of Charles X. was bold enough to declare that the Chamber had no right to discuss the lawfulness of Capital Punishment. It was not until 1830 that the debates on the subject possessed much general interest. Of those discussions which took place after that date we shall speak in a subsequent chapter.

The development of the views on our subject in the North American States was peculiar. Ever since 1682 the inhabitants of Pennsylvania have repeatedly expressed

[1] Prizes for the best essays on Death Punishment were offered by societies in Paris and Geneva in 1826, and the work of Lucas—*Du Système Pénal et de la Peine de Mort en particulier*, Paris, 1828—obtained the prize.

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their desire that Capital Punishment should be limited to murder. The Quakers especially endeavoured to show that the penalty was altogether unlawful, or that it should at least be confined to the gravest crime. A sort of compromise between the legislature of Pennsylvania and the Quakers resulted in the limitation of the penalty to murder. After the lapse of three years, the law was provisionally renewed, and at last, in 1794, definitively enacted. The discussion in the Pennsylvanian legislature had an influence on surrounding States. A translation of Beccaria's work was read with avidity, and his views supplied fresh impulse to the movement in favour of abolition. But violent opponents of the measure were not wanting. The combatants on both sides quoted Scripture in favour of their respective views, but without satisfactory results. Accordingly, as one or the other party prevailed, the abolition of Death Punishment, or its retention, was constituted the law in the various States. Livingston, by his energetic struggle against Death Punishment, exercised a very powerful influence in favour of abolition. We refer specially to his report of 1822, and to that other report which forms the introduction to his Criminal Code. It is true that a great deal may be said against his views on the philosophy of Right, but his comprehensive genius, the proofs afforded of his learning and practical experience, and the spirited manner in which he demolished the arguments of his antagonists, made a deep impression in America, and even now fully deserve the attention of the legal profession in every country.[1]

[1] *Vide* Appendix D. for a biographical sketch of Livingston.

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In connection with this part of our subject it is worthy of notice that in America, especially in Pennsylvania, the conviction first gained ground that murder, if punished with death, ought to be distinguished as murder of the first and second degree. This view was soon incorporated into the codes of other American States.

Besides, the policy of executing criminals in the presence of a few selected individuals, and not before the public, was first advocated in America. The question is continually kept before the American public by means of petitions, motions in the legislative assemblies, and public meetings. This continual agitation on the subject has naturally produced an immense mass of materials relating to our question.

NOTE REFERRING TO LEIBNITZ (p. 13).—Whilst this work was in the press we learned that Leibnitz did take a practical interest and was employed in legislative labours. "At the last meeting of the Royal Academy at Berlin held in commemoration of the anniversary of Leibnitz," says a note in *The Reader* of July 23, 1864, "the president, Professor Trendelenburg, communicated a hitherto unprinted essay of Leibnitz, which exists in his own hand in the Royal Secret States Archives, and was probably written for the Elector Frederic III. in 1700. It contains proposals for the amendment of legislation and jurisdiction. This essay was found among the documents from which the *Kammergerichts Ordnung* of 1709 was prepared."

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CHAPTER III.

OPINIONS OF WRITERS ON CAPITAL PUNISHMENT SINCE 1830.

A PERUSAL of the writings on the subject of Capital Punishment will satisfy the reader that the result at which an author arrives greatly depends on his views regarding the origin of the State, the nature and extent of State authority, as well as the statistics on which he has founded his system.

What is the object of Punishment? Is it to carry out retributive justice, or to deter man from the commission of crime? The principle of justice and the deterring principle are the characteristic badges which indicate the two leading parties of German writers on the subject. There are, besides, a great many subdivisions—almost as numerous as authors. The conclusions as to maintaining or abolishing Death Punishment vary according to the recorded facts and experiences which the writer has selected as specially important. The decided opponents of Capital Punishment were Eschenmaier, Neubig, Grohmann, Zöpfl, Holst, Schaff-

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rath, Althof, Nöllner, and Lichtenberg.[1] Some of these writers attack the justice, others the expediency, of the penalty. But, on the other hand, there are many distinguished authors who advocate the maintenance of Capital Punishment. Some of these consider the penalty indispensable, and advocate its maintenance for all time; while others consider the penalty necessary only for our own time, and think it may be dispensed with in future. These advocates are Heinroth, Reidel, Stahl, Richter, Jarke, Rotteck, Hepp, and Henrici.[2]

The views of German writers on Capital Punishment have gradually undergone important changes—retributive justice being more and more substituted for deterring as the end aimed at in all punishments. The reformation of culprits is another object which in our day is brought into gréater prominence than formerly. The improvement of the prison system, the erection of penitentiaries and solitary prisons, was, according to the

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[1] Eschenmaier: *Ueber Abschaffung der Todesstrafe.* Tübingen, 1831. Neubig: *Die rechtswidrige Todesstrafe.* Nürnberg, 1833. Grohmann: *Ueber das Princip des Strafrechts.* Karlsruhe, 1832. Zöpfl: *Denkschrift über die Rechtmässigkeit und Zweckmässigkeit der Todesstrafe.* Heidelberg, 1839. Althof: *Ueber Verwerflichkeit der Todesstrafe.* Lemgo, 1842. Schaffrath: *Grundwissenschaft des Strafrechts.* Leipzig, 1841, p. 94. Nöllner: *Wissenschaft und Leben in Bezug auf Todesstrafe.* Frankfürt, 1843. Lichtenberg: *Ueber die Strafe der Zuchthäuser*, p. 158.

[2] Heinroth in Hitzig's *Zeitschrift für Criminalrechtspflege*, Heft 45, p. 193. Reidel (gegen Zöpfl): *Die Rechtmässigkeit der Todesstrafe.* Heidelberg, 1839. Stahl: *Philosophie des Rechts* ii., p. 392. Richter: *Philosophisches Strafrecht*, p. 249. Jarke: *Handb. des Strafr.* i., p. 22. Rotteck: *Lehrb. des Strafr.* iii., p. 244. Hepp: *Ueber den gegenwärtigen Stand der Streitfrage über Zulässigkeit der Todesstrafe.* Tübingen, 1835; and Hepp in the *Archiv des Criminalrechts*, 1847, p. 461. Henrici: *Ueber Unzulänglichkeit eines einfachen Strafprincips*, p. 272.

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writers of this epoch, the principal duty of the legislator and of the executive. The introduction of these improvements was thought indispensable before Capital Punishment could with safety be abolished. Besides, the question whether Christianity permitted or even demanded the infliction of the penalty of death was made the subject of learned inquiries.[1]

This question is best answered in the negative by Trummer and Schlatter.[2] Geib, Biener, Hepp, defended the penalty as indispensable in order to maintain the due relations between crimes and penalties. A great many authors thought it was only necessary to get rid of the aggravated infliction and the accompanying abuses, whilst others considered that the chief objection would be removed if public executions were abolished. Others, again, defended the infliction of the penalty for certain crimes, on the ground of retributive justice, thinking that political reasons especially rendered it indispensable.

A new inducement for discussing the question was presented by the proclamation of the fundamental rights of the German nation by the Parliament at Frankfurt-on-the-Main, 1848. Capital Punishment was abolished by the preamble to the Constitution; but at that time

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[1] SCHILDNER: *Kleine Aufsätze aus bedrängter Zeit*, p. 79. WISSLER: *de Christiano capit. pœn. vel admitt. vel repud. fundam.* Gött., 1838. HOLST: *Die Todesstrafe aus dem Standpunkte der Vernunft des Christenthums.* Berlin, 1837. HEPP: *Darstellung der heutigen Strafrechts Systeme*, i. p. 333. MITTERMAIER: *Aufsatz im Archiv des Criminalrechts*, 1841, p. 328; 1857, p. 17.

[2] TRUMMER: *Verhältniss der heutigen Strafgesetze zum Christenthum*, § 9-15. SCHLATTER: *Das Unrecht der Todesstrafe.* Erlangen, 1857.

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political passion and party feeling ran so high as to render a calm theoretical inquiry almost impossible.

Two practical criminal lawyers of high position and mature experience, whose testimony has great weight—Count Reigersberg[1] and Arnold[2]—spoke out emphatically in favour of abolition. The inquiries of Köstlin Berner and Mehring met the objections of adversaries, and led to the result that the infliction of death was unlawful. Recently the necessity of abolition has been proved by Schlatter, Nöllner, and Götting—the two latter looking on reformation as the aim and end of penalties. It is matter for regret that the German press was by the Courts of Justice prevented from giving publicity to the views of authors on the subject.[3]

In FRANCE many books both for and against Capital Punishment have been written. Guizot's work *De la Peine de Mort* (Paris, 1822), containing new and important arguments against the infliction of death for political crimes, was a valuable addition to the literature on the subject. He demonstrates in a clear manner the necessity for the abolition of Death Punishment for

[1] *Gerichtssaal*, 1854, i., p. 432. This venerable judge (Reichskammerrichter), for many years Minister of Justice in Bavaria, had acquired rich experience; and in 1861, when he was in the ninety-third year of his age, told the author that he was convinced Death Punishment must be abolished.

[2] *Archiv des Criminalrechts*, 1854, p. 544, and *Gerichtssaal*, 1858, p. 155. Arnold was for many years Councillor of State (Reichsrath) and President of the Court of Appeal, and combines a thorough knowledge of law with an extensive experience of life.

[3] Against the editor of the *Dresdner Anzeiger* a penalty was inflicted by a subordinate, and confirmed by a superior court, for a condemning criticism on Capital Punishment. We shall see in a subsequent page that similar encroachments have taken place in France, and met with general disapproval.

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political crimes from the very nature of such offences. Wherever two political parties are opposed to each other, one of them will always look upon the executed culprit as a martyr. Consequently, Capital Punishment can have no deterring effect. The Société de la Morale Chrêtienne set themselves the task of bringing about the abolition of Death Punishment, and caused many essays to be written advocating their views. The National Assembly of 1848 abolished Death Punishment for political crimes, but motions in favour of the total abrogation of the extreme penalty, though discussed, were not carried. Among the books published on the subject there was only one which advocated abolition — viz., *Abolition de la Peine de Mort*, by Schoelcher. The National Assembly, in 1851, rejected his motion for abolition.[1] Practically, capital executions have been greatly diminished in France since 1832, at which date juries were allowed to find a verdict of murder with extenuating circumstances, and in these cases no sentence of death was pronounced. A jury, however, in 1851, found the writer and editor of a newspaper guilty for publishing an article on Capital Punishment.[2] This was certainly no encouragement to free inquiries on the subject. On the whole, the majority[3] of writers look upon Death Punishment as

[1] MOLINIER published his work, *Du Droit de punir et de la Peine de Mort* (Toulouse, 1848), in which he advocates the maintenance of Death Punishment, but would confine it to the gravest crimes.

[2] *Vide* FORSYTH'S *Trial by Jury*, p. 361, in which this verdict is criticized with deserved severity.

[3] HELIE: *Théorie du Code Pénal*, vol. i., pp. 99-117; BERTAULD: *Cours de Droit Pénal*, p. 200; TREBUTIEN: *Cours*, p. 210; TISSOT: *Le Droit Pénal dans ses Principes*, Paris, 1860, i., p., 398.

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lawful and necessary,[1] at least for the present time, during which they think that abolition would be a dangerous experiment, while the minority[2] persevere in their efforts for abolition.

The English literature bearing on our subject has a different character. The number of advocates for abolition has been on the increase ever since 1830.[3] The Society for the Abolition of Capital Punishment[4] propagate the opinion of its injustice and unlawfulness, and the inquiries of Parliamentary Committees and Royal Commissions prevent the public interest from

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[1] Odillon Barrot opposes this view in his excellent criticism of the views of Rossi (who, in *Le Droit Pénal*, iii., chap. 6, defends Capital Punishment), in *Séances de l'Académie des Sciences Morales*, 1856, pp. 92-99.

[2] BOERESCO: *Traité Comparatif des Délits et des Peines*, 1857, pp. 348-84; ORTOLAN: *Elémens*, p. 604 (he besides insists on a reform of the whole penal code). For abolition we have also LAGET VALDESON: *Théorie du Code Pénal Espagnol*, Paris, 1860, p. 151.

[3] Particular attention is due to an essay in the *Jurist*, x., p. 44; H. B. Andrews' "Criminal Law," being a commentary on Bentham on Death Punishment (London, 1833); *Old Bailey Experience on Criminal Jurisprudence, &c.*, London (no date); WAKEFIELD: *Facts relating to the Punishment of Death*, 1831; the articles reprinted from the *Morning Herald*, and published under the title, *The Punishment of Death*, 2 vols. (London, 1836), are important, and *Vacation Thoughts on Capital Punishment*, by Mr. Charles Phillips, A.B., London, 1858, one of the most important of modern writers on the subject.

[4] The Society for the Abolition of Capital Punishment has for its treasurer Samuel Gurney, Esq., M.P. Among the members of committee are Richard Cobden, Esq., M.P.; John Bright, Esq., M.P.; William Ewart, Esq., M.P.; Charles Gilpin, Esq., M.P.; Henry Pease, Esq., M.P.; Edmund Beales, Esq., M.A.; Rev. Professor Christmas; Rev. J. Hildyard; Professor Leone Levi; Edward Webster, Esq.; Thomas Beggs, Esq., &c. In our Appendix E. we give a series of questions, kindly forwarded to us by Mr. William Tallack, the secretary of the Society.

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flagging. During the last few years the decided opponents of Capital Punishment have greatly increased.[1] This is of so much the more importance because the inquiry in England is mainly based on practical grounds. The discussions show that persons have been condemned that ought to have been acquitted.[2] This fact has given rise to animated debates in congresses, especially those held by the National Association for the Promotion of Social Science.[3] But on the other hand energetic advocates for the maintenance of Capital Punishment are not wanting.[4]

In NORTH AMERICA the inquiries on the subject are not so numerous as in England. Life in the States affords many opportunities for practical influence by means of petitions addressed to the Legislative Assemblies, and the prevailing practical bias of the jurists prevents them from indulging in theoretical disquisitions. In this respect the reports of the various committees which have been brought into existence by the petitions alluded to are of considerable importance. It is true that they often furnish repetitions of arguments and views familiar and commonplace, or theological

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[1] *Considerations on Punishment of Death*, by Charles Neate, Esq., M.P., one of her Majesty's Commissioners, 1864; WINSLOW's *Journal of Psychological Medicine*, 1856, April, p. 347; Mr. F. HILL: *On Crime, its Amount*, &c., p. 169; *Christian Politics*, an essay on the text of Paley, by the Rev. Professor Christmas, London, 1856, p. 229; *Dublin Review* —a Roman Catholic Journal—1860, August, p. 472.

[2] Of special importance is the case of Dr. Smethurst. Vide *Gerichtssaal* (German periodical), 1860.

[3] *Vide* Transactions of the Association, 1858, p. 49; and 1859, p. 487.

[4] *Vide* especially the good essay by Mr. W. M. BEST in the Papers of the Juridical Society, 1856, p. 400.

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inquiries, as to the sanction or prohibition of the sacred writings. But at the same time they supply a great many facts and observations, especially regarding the deterring influence of Capital Punishment and its prejudicial consequences.[1]

In most of the States the punishment of death was inflicted for murder only, and even for that crime not unconditionally. Accordingly, executions were not frequent, whereby the inducement for petitioning the Legislative Assemblies was diminished. The present state of American views regarding our subject will be best learned from the writings of Davis and Walker, by whom the argument that Capital Punishment is based on the right of necessity (Nothrecht) is refuted, whilst, at the same time, they show that the public is becoming more and more favourable to the abolition of the penalty. The prevailing view is well expressed in the message of the governor of Massachusetts.[2]

"The application of Death Punishment as a penalty for crimes committed, will some day cease to be known among civilized nations. Already philosophers, jurists, statesmen, who have large experience in human affairs, and occupy high positions in life, have in numerous

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[1] The most remarkable of these reports are those of Massachusetts, 1831, 1837, 1846, and 1855; the New York reports of 1851, 1853, and 1857; the discussions in Boston, March 22, 1835, before the Legislative Committee, on the Abolition of Capital Punishment, are worthy of special attention. *Vide* Appendix F., Mr. John Bright's speech, in House of Commons, on this subject.

[2] Address of J. Andrews to the two branches of the Legislature of Massachusetts: January 5, 1861, p. 17. Not having access to the original, we are under the necessity of re-translating the passage quoted from the German translation.

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instances spoken out against this penalty, and a new era in the progress of Massachusetts will begin when the State, by abolishing this penalty, adapts its Penal Legislation to the most enlightened principles of criminal jurisprudence and takes into consideration the true well-being of the citizens."

In ITALY Capital Punishment was especially the subject of persistent learned investigations. The views of Beccaria had struck their roots so deeply, that the subsequent writers were more or less under his influence. It is true that the increase of crimes caused by wars and political circumstances, prevented many authors from demanding the immediate abolition of Death Punishment. The favourite theory of defence and necessity, as laid down by Romagnosi, found many adherents, and led to the justification of the extreme penalty, whilst, however, the necessity of restricting its infliction to a very limited number of crimes was acknowledged.[1] Others recognized the lawfulness of the punishment, but at the same time the necessity of threatening it for exceptional cases only, and providing it with many guarantees for removing the risks of error.[2] Carmignani was the most decided advocate

[1] Spirited defenders of the penalty are BAROLI: *Diritto Naturale*, Cremona, 1807; GIULIANI: *Istituzioni di Diritto Criminale*, Macerata, 1856, vol. i., pp. 48, 117; CONTOLI: *Dei Delitti e delle Pene*, Bologna, 1830, vol. i., p. 40; TONELLI, in the *Journal Antologia*, 1832, March, p. 89, with which can be compared a very good refutation by LAMBRUSCHINI in the *Antologia*, July, 1832, p. 84. GIORGI SAGGIO: *Sui Principi del Diritto filosofico sulla Teoria del Diritto penale*, Padova, 1852, p. 288.

[2] To this class especially belongs RAFFAELLI'S work, *Nomotesia Penale*, Napoli, 1824, iv., pp. 157-173.

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of abolition.[1] In 1848 the Italian inquiries took another direction; when in the chambers at Naples the representatives Mancini and Pisanelli[2] brought forward motions which had for their object the bringing about of gradual abolition by enacting many restrictions in the application of the penalty.

One of the most important of modern books advocating abolition, is that of Albini.[3] The author, with great sagacity, refutes the arguments brought forward in defence of the lawfulness and necessity of the penalty, and applies with great exactness the observations showing the injurious consequences of its application. Other writers express similar opinions,[4] while at the same time defenders of the penalty are not wanting.[5] Eller in his work (*Della Pena Capitale*, Venezia, 1858), with much detail, and, like Albini, with great sagacity, but at the same time with many arguments which, consistently applied, would lead to the abolition of all penalties,[6] shows that Capital Punishment is both unlawful and unnecessary. One of the most remarkable

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[1] In the work *Una Lezione sulla Pena di Morte*, Pisa, 1836. It is not clear that Carmignani persevered in his view, seeing that in his draft of a Criminal Code for Portugal he maintains Death Punishment. Vide *Scritti inediti di Carmignani*, vol. v., p. 61.

[2] PISANELLI: *Lezione sulla Pena di Morte*, Torino, 1848.

[3] *Della Pena di Morte, Lezione di Albini*, Vigevano, 1852. Albini is one of the most profound of Italian authors, and deeply versed in German literature.

[4] For instance, POLETTI: *Del Diritto di Punire*, p. 376; and SETTI, in the journal *La Temi*, Firenze, 1857, part 6, p. 17.

[5] TAPANELLI: *Corso di Diritto Naturale*, lib. iv., cap. 3, 150, 303.

[6] In consequence many voices were raised against him. For instance, GABELLI, in *Monitore dei Tribunali*, Milano, 1860, No. 29. See also *Eco dei Tribunali*, Venezia, 1860, No. 1024.

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literary phenomena relating to the subject is Eller's journal (*Giornale per l'Abolizione della Pena di Morte*, Milano, 1861), which is intended as a central organ for all inquiries on the abolition of Death Punishment, and already contains many interesting essays. One of these worthy of special attention, is the paper contributed by Ambrosoli ("Sul Codice penale Italiano,") who, in a practical manner, shows that the number of crimes has not increased in those States in which Capital Punishment has been abolished. The great interest which the practical lawyers of Italy take in the abolition of the penalty of death is evident from a recent opening speech of the president of one of the courts.[1]

We must not omit to state that in SWEDEN also the question of maintaining Capital Punishment has been the subject of discussion. The present king, while Crown Prince of Sweden, stated in a dignified manner that the punishment of death should be abolished. He called attention to the painful position of the sovereign to whom the appeals for mercy were made, and at the same time showed that the object of Punishment is better attained by an improved system of imprisonment than by the infliction of the extreme penalty.

[1] Viz., the President of the Court at Leghorn on November 11, 1861.

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CHAPTER IV.

LEGISLATION OF THE LAST THIRTY YEARS.

THE Criminal Codes of GERMANY, the greater part of which is based on the Bavarian Code, show that the increasing number of the opponents to Capital Punishment has exercised an influence upon legislation. But this influence was not strong enough to bring about abolition. The motives, just made public both in the annals of legislation and the debates of legislative assemblies, assert that Capital Punishment can be justified, but must be restricted to a certain number of crimes clearly defined. But the arguments brought forward in support of this view are weak, and derived either from a mistaken principle of justice or from the principle of deterring. The Penal Code of Würtemberg still threatens death for thirty specified crimes. It was therefore meritorious in Hepp[1] energetically to blame this abuse of the penalty—an abuse specially evident in punishing high treason, treason, poisoning, burglary, and arson. In justice, however, it must be stated that these Codes in some of their enactments restrict the infliction of Capital Punishment; especially by mitigating the penalty on account of diminished imputability, by decreeing that culprits under eighteen years of age

[1] Vide *Archiv des Criminalrechts*, 1847, No. xvi.; 1848, No. x.

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(in Austria even those under twenty,) shall not be executed, and that death shall not be inflicted when the verdict is founded on circumstantial evidence alone. The most important restrictions of Death Punishment are contained in the Code of Brunswick, by allowing the judges to remit the penalty, even in crimes threatened with death, if attended with a combination of extenuating circumstances; besides making the legal menace not absolute even for murder.

The year 1848 is an important epoch in the history of Death Punishment in Germany. The National Assembly of Frankfurt laid down that the principle of the abolition of Capital Punishments should be one of the fundamental laws of the nation; excepting only those cases in which military law renders it indispensable, or naval law allows it to exist for the suppression of mutiny. It is to be regretted that this resolution has been made the subject of undignified attacks. It was pretended to be improper that such a proposition should be made one of the fundamental rights of the nation. Even the intentions of those who brought forward the motion or voted for it were suspected, while the admitted exception with regard to military matters was considered as an avowal that after all Capital Punishment could not be dispensed with. The impartial inquirer will soon find out the absolute futility of these objections. The point was adopted in most of the German States which recognized the fundamental laws at all.[1] But the reaction called

[1] In Austria, Prussia, Bavaria, and Hanover, where the fundamental laws were not adopted, the point regarding the abolition of Death Punishment had no application.

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forth by the dangerous popular movements of 1848-49 had its influence on the legislation of the German States regarding Capital Punishment. Great anxiety prevailed to prevent the recurrence of excitement and riots; deterring severity, menace of death, seemed the means most adapted for effecting this purpose, and under the influence of such motives, Capital Punishment was in most of the German States re-enacted. Posterity will pronounce a severe sentence on the discussions of many of the Legislative Assemblies of this period. Great diversity of opinion was manifested in these debates, the majority for the re-introduction of the Capital Penalty being, in most cases, opposed by a numerous minority. The views were unsettled, hesitating, and wavering.[1] The advocates for the maintenance of the punishment alleged that the people desired to retain it as the only penalty which was commensurate with the greatest crimes; and that recent dreadful cases of murder proved imprisonment for life to be insufficient; besides that abolition could not take place in one State unless simultaneously enacted in all. But there was progress in spite of this reaction, Capital Punishment not being re-enacted for many a crime which in the former Codes was threatened with the penalty. Oldenburg, Anhalt, and Nassau alone have not re-introduced the punishment of death.

[1] In the Upper Chambers there was everywhere unanimity for the re-enactment of Death Punishment. In the Lower Chamber of Würtemberg the general question as to the re-enactment of Capital Punishment was answered in the affirmative by 47 against 34 votes. In Darmstadt 23 voted for and 21 against Capital Punishment. In Weimar, the reporter of the Committee moved for the rejection of the

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Whether the sentence should or should not be mitigated on account of extenuating circumstances—whether the execution should be public or private—were two other points eagerly discussed. The last point, publicity, was in many States decided in the negative. The legislatures of Prussia, Würtemberg, Hamburg, Altenburg, the kingdom of Saxony and Baden, adopted executions in a secluded space in the presence of trustworthy witnesses. The point of extenuating circumstances was adopted from the legislation of France. Extenuating circumstances in cases of murder, as a motive for remitting Death Penalty, had been in practice in France since the year 1832. Some of the legislators of Germany recommended the adoption of this proviso, whilst others opposed it on the ground of some alleged prejudicial consequences in France.

The march of legislation in PRUSSIA and BAVARIA affords a good illustration of the progress of views of legislators on Death Punishment. In Prussia the draft of 1845 adopted Capital Punishment in one case—however, only conditionally, by giving the judge the option of pronouncing or mitigating the penalty. In the debates of the combined committees (vereinigte Ausschüsse), 1847, on that draft, the question of maintaining Capital Punishment was explicitly discussed. The majority were for retaining the penalty. In the motives for the draft of 1857, it is stated that the maintenance of this penalty was perfectly justified, the object of the punishment being attained in those cases in which the

Government draft re-enacting Capital Punishment; and on division 16 voted for and 14 against Capital Punishment. In Coburg 13 voted for and 5 against the penalty.

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guilt of the criminal could be expiated and public safety secured only by the death of the culprit; while the conscience (Rechtsbewusstsein) of the people recognized the necessity of expiating the gravest crimes by death. In the committee of the Second Chamber, fourteen members against four voted for the maintenance of Capital Punishment, adding to the motives in the draft of the Government—that a considerable portion of the population recognized the justice of the punishment for the gravest crimes, and considered it indispensable as a deterrent [1]—that, besides, the difficulty of substituting another punishment was an objection against the abolition of the penalty of death. The report of the committee of the First Chamber states in a few words that the punishment is necessary at least for the present. It is a matter for regret that the draft was not fully discussed in the Chambers, when an opportunity would have been given to the members for expressing their views on this important question, one in which the people at large are deeply interested. It must be admitted that the Prussian Code sparingly holds out the threat of death,[2] but it is nevertheless severer than other modern codes. It renders it impossible for the judge to remit the punishment of death in cases of diminished accountability, and compels him to pass the

[1] Temme, in his *Kritik des Preussischen Entwurfs*, 1843, i., p. 56, says that among the people the consciousness arose that Death Punishment could be dispensed with. In the National Assembly of 1840 the motion for abolition was carried.

[2] Capital Punishment is threatened in paragraphs 61 and 62 (high treason); § 67-69 (treason); § 74 (assaults on the sovereign); § 175 (murder); § 176-179 (two kinds of manslaughter); § 285, 290, 294, 302, 303, 304 (dangerous crimes when a person is killed).

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sentence of death even against youthful criminals so soon as they have passed the sixteenth year of their age. The term high treason is used in an extended sense. Death is besides threatened in eight cases of treason and (in reprehensible imitation of the French Code) in two cases of manslaughter.

In the AUSTRIAN Penal Code of 1852, Capital Punishment is threatened in much fewer cases than in the Code of 1803, but the menace is still by far too frequent. In the courts of justice, however, death is nevertheless not so frequently inflicted as in other countries—the law exempting the cases which are founded on circumstantial evidence, as well as those in which the criminal is under twenty-one years of age. The law which in common cases makes it competent for the judge to inflict a mitigated punishment on account of a combination of extenuating circumstances, withdraws this power from him in those cases, in which the penalty is death.

In the BAVARIAN Code, which was proclaimed November 10, 1861, the threat of Capital Punishment is much less frequent than in the preceding Code. But even in those cases to which the menace applies, the judge is prevented from pronouncing the fatal sentence by the enactments regarding the extenuating effect of diminished imputability (68), exclusion of minors (83), of crimes committed abroad under certain conditions (13), and with regard to the prescription of the sentence (100). It is to be regretted, that the Code renders it impossible for the judges to mitigate the penalty of death on account of extenuating circumstances, however important they may be. In one case only (120, active

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offence against the king), can, in minor crimes, penitentiaries be substituted for death. In the draft which was published 1857, the government had stated their reasons for maintaining Capital Punishment. It was provisionally preserved, because the doctrine had furnished no convincing proof of its unlawfulness, and because the penalty could not be dispensed with before the people had reached a higher degree of culture and civilization; but government recognized the necessity of restricting the punishment to the gravest crimes, and of abolishing the system of executing culprits before the public. In the debates of the committee in the Second Chamber the chairman (Weis) stated his conviction to be that the State had the right of menacing the penalty, but that it was inexpedient to threaten it in ordinary cases; whereas in extraordinary cases which the State must meet by extraordinary remedies—as, for instance, during political excitement, or when certain grave crimes became epidemic—he considered the punishment justified. After a full discussion, in which the recognized reasons were plainly stated, a division took place, when it was found that four members of the committee voted for, and four against the maintenance of the penalty—the chairman being one of the four for the maintenance. In the committee of the first chamber (Kammer der Reichsräthe) the chairman (Maurer) stated his conviction to be that, for the time being, Death Punishment could not be dispensed with, so long as high treason and other horrible crimes were committed, while guns were put in position to mow down men by thousands, and while the people, especially in flagrant crimes, desired to have guilt expiated by the infliction

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of Capital Punishment. According to the views of the chairman the greater number of the opponents to Death Punishment are, strictly speaking, opposed to all punishment; no inference could be drawn from the possibility of reforming the criminal, as this was not the only object[1] of punishment. Of the members of this committee Count Reigersberg alone specially voted against Capital Punishment, whilst all the rest agreed with the chairman.[2] The question regarding the publicity of executions was the subject of much discussion in the committees of both Chambers. In the session of Parliament (Landtag) 1860–1, these discussions were renewed, while the question as to the maintenance of Death Punishment was not taken up again.

In HAMBURG the maintenance or abolition of Death Punishment has been the subject of legislative debates. Dr. Gallois brought forward a motion in favour of abolition, and a commission of inquiry was appointed. The majority voted against the motion, and gave for so doing this singular reason: that Death Punishment was in accordance with the religious views of the German nation—that by abolishing the penalty, the just proportion between crime and punishment was destroyed.[3]

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[1] The chairman also said "the history of recent years had fully proved that Death Punishment could not be dispensed with." On what evidence this proof was based he has not informed us.

[2] Councillor VON BAYER remarked that while Death Punishment existed in all neighbouring states, the abolition in Bavaria would have the effect of bringing an influx of foreigners to that country in order to commit crimes worthy of death!

[3] Dr. WOLFSON, as the exponent of the opinions of the minority, has, in an able manner, demolished the arguments of the majority. This also, has been done by an essay in Von Holtzendorf's *Strafrechtszeitung*, 1861, Nos. 7 and 8.

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The legislative debates of OLDENBURG and BREMEN on the subject are of great importance. The Code of Oldenburg has not adopted Death Punishment, but substituted for it imprisonment in penitentiaries for life.[1] During the discussions in the Chamber no vote was given in favour of Capital Punishment, and the experience afforded by Oldenburg shows that no bad consequences result from the abolition. In Bremen the new draft (1861) retains Death Punishment for murder only.[2]

In FRANCE, two remarkable circumstances with regard to legislation on Death Punishment have taken place since 1830. Louis Philippe was decidedly opposed to Capital Punishment. He discussed the subject with distinguished jurists, among whom was Berenger. When the dangers of a sudden abolition were considered, the King advised that Capital Punishment should be abolished for several crimes which were menaced by death in the Code. He proposed that juries should be authorized to modify their verdict of guilty, by the addition of extenuating circumstances, in those cases in which they thought that death was

[1] It is to be regretted that this punishment is threatened absolutely, as is shown in the *Archiv für Preuss. Strafrecht*, vol. vii., p. 20. During the Government of Duke Peter no execution took place (according to tradition, in consequence of the influence of the noble duchess). During the French occupation an execution took place, but none since; ever since 1848 Oldenburg has maintained the fundamental rights of the German nation.

[2] The motives assigned are that the execution of great Criminals is imperatively demanded by the public conscience, and that in neighbouring States, Capital Punishment has been re-introduced. *Vide*, against this line of argument, Mittermaier's essay in VON GROSS: *Zeitschrift der Strafrechtspflege*, iv., p. 293.

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disproportionate to the guilt of the culprit. Hence sprang the law of 1832,[1] by which Death Punishment for several crimes was abolished, and power given to juries to find a verdict with mitigating circumstances, even without a question being put from the bench relating to them. Such a finding had the effect of compelling the judge to mitigate the usual penalty. Juries have taken advantage of this proviso for mitigating the penalty as often as they thought the punishment of death disproportionate to the offence. The second important enactment in France has been the abolition of Death Punishment for the so-called political crimes (Constitution of 1848, Article 5). In 1853, it was deemed necessary to remove every doubt respecting the continuance of the penal enactments which had reference to assaults on the Emperor. The law of June 10, 1853, enacts that attempts on the life of the Emperor shall be punished with death.[2]

In BELGIUM, the political transformation of 1830 had an effect on the criminal law. On July 4, 1832, one of the most distinguished men, Brouckère, brought a measure on the abolition of Death Punishment before the Legislature. Although this measure was not approved of by the majority of the members, it nevertheless disposed the public to entertain milder views. The Ministry themselves had not sanctioned Capital Punishment since 1829, and this virtual aboli-

[1] *Vide* BERENGER: *Rapport de la Repression Pénale*, Paris, 1855, p. 29.

[2] It is affirmed, with great pretence, that the reasons which justify the abolition of Death Punishment for political crimes are not applicable to the crimes threatened in Articles 86 and 87 of the Code Pénal.

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tion found an eloquent defender in the representative De Vaulx. When, in the year 1835, some members of the Chamber reproached the Government for abusing the privilege of mercy, the Ministry were prevailed upon, in order to allay the excitement, to petition for an execution; and the King allowed justice to take its course. This very execution, however, led to fresh contentions in the Chambers, one party asserting that it was unnecessary, and thereby advocating abolition; another party approving of the system of not carrying executions into effect; whilst a third party considered repression by means of Death Punishment necessary.[1] The question whether capital crimes were increased or diminished by clemency was answered in the affirmative or negative according to the way in which either party viewed the statistics on the subject.

A draft of a new Penal Code was proposed to the Chambers in 1853, and adopted by the Second Chamber in 1861. Many debates on the abolition of Death Punishment, during the eight years that elapsed between the proposal and adoption, took place. The resolutions which other States had agreed to on the subject had been discussed in the memorial which accompanied the draft.[2] It is stated in this memorial that Death Punishment, if inflicted only for the gravest assaults, had met with the almost unanimous approval of the most cultivated nations of our times. The committee of the Second Chamber declared that, on the one hand, they were unanimous

[1] As shown in VISCHERS' *Zeitschrift für ausländische Gesetzgebung*, vol. viii. p. 118; and in MITTERMAIER'S essay in *Archiv des Crim.*, 1836, p. 11.

[2] *Memorial*, p. 29, of which the author is Professor Haus, of Ghent.

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for abolition in the abstract; but, on the other, they were equally unanimous in opposing it for Belgium, on account of its geographical position, which rendered it dangerous for them to take the initiative in abolishing the penalty. The committee of the Senate fully recognizing the weight of the reason that the penalty existed among all nations, added another—that, according to experience, death penalties had a deterring effect. Under these circumstances, the Chambers resolved on the maintenance of Capital Punishment. It must, however, be acknowledged, that the number of crimes for which it is threatened has been greatly reduced. The menace is only maintained for eight cases.[1] The Code contains, however, some important enactments. *First.* For political crimes—with the exception of Articles 96 and 97—Death Punishment is not threatened. *Secondly.* Persons under eighteen years of age are not punishable with death. *Thirdly.* Under extenuating circumstances, the sentence of death may be commuted for from fifteen to twenty years' imprisonment. The question regarding the maintenance of Capital Punishment was afterwards discussed again, but the penalty was retained.

In ENGLAND, the endeavours of the adversaries of Death Punishment to bring about its abolition, or at least its limitation, have been crowned with success. Instead of one hundred and sixty crimes formerly menaced with

[1] Viz., personal assault on the King (Art. 96), the Crown Prince (97), murder (456), manslaughter against parents (457), poisoning (460), burglary of the gravest kind (555), homicide carried out or attempted in order to commit burglary or theft (556), arson of the gravest kind (624).

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Death Punishment, there are now only seven threatened with the penalty; and, in fact, murder alone is now capitally punished. That in those crimes for which the penalty was abolished no increase has taken place, will be shown from statistics in Chapters Seventh and Eighth. It will also appear that the peculiar mode of procedure in the English courts has its influence in diminishing the number of capital sentences. The growing power of public opinion with regard to the abolition of Death Punishment strengthens the hands of abolitionists, and enables them to bring the matter before the Legislature.[1] These efforts have not yet brought about abolition, but they have been the means of greatly increasing the number of the opponents to Capital Punishment. It is, however, highly creditable to the English Government that they have frequently taken the evidence of eminent and experienced men respecting the operation and influence of Capital Punishment.[2]

In North America, the struggle between those who desire the abolition of death and those who wish to retain the punishment continues; but how numerous the opponents are, may be learned from two facts. *First*, when a jury is empannelled to try a crime threatened with death, they are asked individually whether or not they are opposed to Death Punishment. He who answers in the affirmative is immediately dis-

[1] Mr. Ewart's motions in the House of Commons since 1840 are especially remarkable. On the discussions which these motions led to, *vide* Marquardsen in *Zeitschrift für ausländische Gesetzgebung*, xxii. p. 481; xxiii. p. 202. *Vide* Hansard: Index, Ewart.

Vide Reports and Minutes of Committee of House of Lords, 1844, where will be found important evidences given by superintendents of prisons, chaplains, sheriffs, and other competent persons.

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missed from the jury-box.[1] It frequently happens that the half of the jurymen are discharged. *Secondly.*—When the jurymen know that the legal result of their verdict will be execution, they very often do not come to an agreement.[2] But from this state of things we cannot draw the inference that the voice of public opinion is in favour of abolition. The recent legal enactments which maintain the punishment, and the circumstance that petitions praying for abolition meet with refusals from a majority of the representatives, indicate the prevailing opinion. All, however, are unanimous on one point, viz., that Capital Punishment must be retained for the gravest cases of murder only—murder being divided into two degrees, of which the first alone is punishable with death.[3] In more recent enactments the two degrees of murder are clearly defined.[4] There are peculiar laws in some States, enacting, that the culprit shall be condemned both to death and imprisonment for life, with the proviso that execution shall not take place until the culprit is kept in prison for at least a year; and that at the expiration of that period the governor is authorized to order execution, due regard being had to the circumstances of the case.[5] Death Punishment was entirely abolished only

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[1] *Vide* WHARTON'S *Criminal Law of the United States*, new edition, p. 857.

[2] *Vide* statistics in the *Archiv des Criminalrechts*, 1853, p. 62.

[3] *Vide* WHARTON: *Criminal Law*, p. 930.

[4] *Vide* Law of New York, 1860; *Philadelphia Prison Discipline*, July, 1860, p. 142; *Gesetzbuch von Philadelphia von* 1860, § 75; Law of Massachusetts, 1858.

[5] In Maine since 1837, and in Massachusetts since 1852. In the atter State this peculiar law was very properly abrogated in 1858.

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in Michigan, 1846; in Rhode Island,[1] 1852; in Wisconsin, in 1853.

With regard to the fate of Death Punishment in ITALY, the march of legislation in TUSCANY deserves special attention. Here the adherents of the deterrent theory tried to reintroduce the abolished Death Punishment when the reaction had become powerful; they succeeded, particularly with the revolting law of May 28, 1803.[2] Then followed the introduction of the French Code, in which certainly Death Punishment is very frequently threatened. The universal indignation of the Tuscans, who had been accustomed to milder legislation, was roused by this enactment. After the downfall of the French Government, the restored rulers considered themselves obliged to support the throne by severe threats of Death Punishment. The law of July 22, 1816, in addition to the crimes which were made capital by the laws of 1795, threatened Death Punishment likewise for theft when committed with violence or with arms; the courts of Tuscany, however, tried to apply the new enactments with the utmost mildness.[3] A decidedly human epoch, and one decidedly favourable to progress, began with the accession of Leopold. In 1830, after a long pause, two culprits were executed, one in Pisa, the other in Florence. The proceedings attending these executions, and the behaviour of the

[1] Important observations on Rhode Island, Maine, and Michigan are given in the Report on Capital Punishment, January 23, 1852, and in the Report of 1857, and the Report of the Committee for Abolition of Capital Punishment, New York, pp. 20-25. *Vide* Professor Upham's letter to Mrs. H. B. Stowe, Appendix E.

[2] Vide *Zobi Storia*, vol. iii., p. 625.

[3] *Vide* PUCCIONI: *Il Codice Penale*, i., p. 133.

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people,[1] who in a demonstrative manner manifested their opposition to executions, made a deep impression on the benevolent ruler, which was strengthened by the reports he received from all sides respecting the effects of Death Punishment.[2] No capital sentence has been carried out in Tuscany since 1831; but the law of August 2, 1838, enacted that capital sentences could only be pronounced by unanimous votes of all the judges. From 1838 to 1847 two such sentences were pronounced, but even then mercy interposed. A law of October 11, 1847, however, abolished Capital Punishment. Accordingly the penalty of death was excluded from the draft of the Penal Code. The unfortunate events which took place in Tuscany in 1849 led to the conclusion that greater severity was necessary, and that Death Punishment was indispensable; besides, foreign influences co-operated to bring about the law of November 16, 1852, by which Capital Punishment was reintroduced. It was accordingly threatened for many crimes in the Penal Code of 1853.[3] But in order to yield to popular feeling, Article 309 ordained that, in case of murder, the court should have the power of substituting, on account of extenuating cir-

[1] Vide *Archiv des Criminalrechts*, 1857, p. 347. In Florence all shops and mercantile vaults were closed; the street along which the procession passed was empty, the citizens hastened to the churches for prayer, and the scaffold was surrounded by a few spectators only.

[2] The author of this work had in the year 1841 the honour of a long conversation with the Grand Duke, who said the people had taught him such a lesson that in future no executions should take place in his dominions, especially as the reports of the authorities were unanimously in favour of the abolition of Capital Punishment.

[3] For the alleged reasons for the law, see PUCCIONI: *Il Codice Penale*, i., p. 126.

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cumstances, imprisonment for life instead of death. The new Code was received with indignation, both by the people and the judges, and in one case[1] where a capital sentence had been delivered, the popular excitement was so great as to compel the Grand Duke to grant a pardon.[2] When in 1859 the well-known political revolution had taken place, the Government of Sardinia was obliged to abolish Death Punishment by the decree of January 10, 1860.[3]

The march of legislation in PIEDMONT deserves attention. A code was promulgated in 1839 which, although it contained many reforms, was nevertheless very severe, and threatened Death Punishment in forty-one cases; so that the number of capital sentences was greatly increased without diminishing crimes. In March, 1856, important debates took place in the Second Chamber. Many speakers violently attacked Death Punishment, and a new draft[4] was resolved upon, by which the penalty was restricted to much fewer cases, and provided that the courts of law, on account of important extenuating circumstances, should pronounce a sentence a degree milder than the ordinary one. The Penal Code of November 20, 1859, was founded on this draft. It threatened death only in thirteen cases,[5] and the lowering of penalties in general was ordained on account of extenuating circumstances. We must

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[1] *Vide* important statements in BERENGER: *La Repression Pénale*, p. 27.

[2] PANATTONI in the journal *La Temi*, vol. v., p. 682.

[3] PERI: *Risposta al Morelli*, Firenze, 1860, p. 18.

[4] *Vide*, on this subject, *Archiv des Criminalrechts*, p. 165.

[5] *Vide* AMBROSOLI: *Il Codice Penale*, p. 37.

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not omit to state that the measure on the abolition of Death Punishment introduced to the Turin Parliament, May 8, 1860, by the representative Mazzoldi, led to interesting debates,[1] in which some cases of unjust capital sentences were referred to. The reasons adduced against the motion by the Minister of Justice were the usual ones, and had the effect of leading to the resolution that the question respecting abolition should be adjourned until the discussions took place regarding a general Penal Code for the Kingdom of Italy.

We must not omit to state that the legislative body of the REPUBLIC OF SAN MARINO resolved in 1848 to abolish Capital Punishment, and that the penalty was excluded from the Code of 1859.[2]

In order to give an adequate idea of the legislation of SWITZERLAND with regard to our subject, it must be stated that, in 1848, by the Constitution,[3] Death Punishment for political crimes was abolished, and by the new Penal Codes for the Cantons Freiburg[4] and Neufchâtel,[5] the penalty was entirely abolished for all crimes. From the debates on the Codes of St. Gallen, Aarau, and Soleure, it will be seen that in Switzerland

[1] Vide *Eco dei Tribunali*, 1860, No. 1038, in which the debate is admirably reported.

[2] The author of this Code is Professor ZUPETTA (formerly professor in Naples, afterwards in Turin, and, at last, in San Marino). Zupetta, in his work on Criminal Law, had previously contended against Death Punishment.

[3] *Vide* Deed of Constitution, Art. 54. TEMME: *Lehrbuch des Schweizerischen Strafrechts*, p. 240, states for what crimes Death Punishment is still threatened in the Cantons.

[4] *Vide* Penal Code of Freiburg, 1849.

[5] *Vide* Law, 1854. *Archiv des Criminalrechts*, 1855, p. 302.

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also men of position and experience spoke out boldly in favour of abolition, and showed that Capital Punishment was not necessary.[1] It was, nevertheless, not abolished, but the number of cases for which it was retained was diminished. Some of the Codes give power to the judges to lower the penalty on account of extenuating circumstances;[2] and others enact[3] that, after the lapse of five years, no sentence of death shall be pronounced.[4]

In the discussions on the law of the NETHERLANDS of 1854,[5] one of the representatives moved for the abolition of Capital Punishment, when a member of the Government replied that he wished to retain the penalty only for incorrigible criminals and for cases of repeated relapses; but so little do the people of the Netherlands desire abolition, that the penalty of death has been threatened by the resolutions of the legislature even for theft and infanticide.

The recent draft of a Code for PORTUGAL has the peculiarity that the Legislative Committee set out with

[1] The draft of the experienced statesman Dubs, for Zurich, is remarkable. It contains no mention of Death Punishment, and bears testimony in the preface (p. 14) that the people have almost abandoned the penalty. In the Report of the Committee to the draft of the Penal Code of St. Gallen, three excellent practical lawyers have adduced cogent reasons against the penalty.

[2] This is the case in Geneva. *Vide* the new Code of Lucerne of 1861, § 72; Code for Appenzell, § 50.

[3] Code of Soleure, § 61.

[4] In the Canton Tessino in 1860, a measure was brought forward for the abolition of Death Punishment. [Mr. Tallack has informed the editor (November 17) that the Canton Zurich abolished Capital Punishment by a decree of the Grand Council, October 10, 1864.]

[5] *Vide* BAUMHAUER'S *Zeitschrift für ausländische Gesetzgebung*, XXVIII., p. 291.

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the principle, that the object of all punishment is the reformation of criminals; but they, nevertheless, adopted Death Punishment, being fully aware of their inconsistency; which, however, they attempted to justify by the assertion, that for criminals of such depravity as to exclude every hope of reformation, the object of reform must, in the interest of society, yield to the indispensable object of deterring. The draft, however, has not made frequent use of Death Punishment. As, *First.*—For political crimes Capital Punishment is not threatened. *Secondly.*—Such a menace refers only to two crimes. *Thirdly.*—It is enacted that, on account of a number of extenuating circumstances, the judge must pass a milder sentence. *Fourthly.*—On minors under nineteen years of age, no capital sentence can be passed.

The recent law of SWEDEN threatens the crime of murder with Death Punishment, but, at the same time, gives the judges the power of substituting imprisonment for life when the crime is attended with extenuating circumstances.[1] Similar decisions are contained in the law with regard to poisoning (§ 20); attempts to procure abortion when the death of the mother follows (§ 30).

A few words on WALLACHIA will suffice. The Minister of Justice, Boeresko, laid a bill before the Central Committee, in which he proposed the abolition of Death Punishment, basing his proposal on dignified reasons stated in the preamble.[2]

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[1] Law of January 29, 1861.

[2] Printed in the *Revue Critique de Législation*: Paris, 1860, ii. p. 441.

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CHAPTER V.

THE THEORY OF STATE RIGHTS IN RELATION TO PUNISHMENT.

It is clear that the questions regarding the right of the State to inflict Death Punishment, and the expediency of exercising that right, could only become the subject of serious inquiry when the progress of the great intellectual movement in Europe no longer allowed the authorities to support their measures merely by an appeal to precedent. The character of such an investigation is determined by the weight which public opinion on the one hand, and the State authorities on the other, attach to it. The more civilization progresses, the more clearly State authorities see that their commands are only effectual, when recognized as just by a good-intentioned and sensible majority, the more influential will be the results both of theoretical inquiries and practical legislation. A wise Government will not stifle the spirit of inquiry and criticism, but rather encourage it as the best means of learning what is defective in the laws and institutions. The reform of prevailing views proceeds, under all circumstances, slowly and gradually;

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it comes forth as a doubt, is then recognized as a truth by a small minority, while the majority rail at and contend against it; until, by degrees, the minority becomes the majority. Such has also been the march of the views on criminal law in general, and penalties in particular. So long as the State was considered to be entitled to ordain anything and everything,—and no doubt existed as to the right of State authorities to inflict whatever evils they deemed expedient in order to attain their ends (of which they themselves had only a dim and hazy idea), including the penalty of death,—a justification of Death Punishment seemed to be quite superfluous; all the more so, while the idea advocated by Hobbes was universally diffused, that the criminal was the enemy of the State, and, as such, to be attacked and destroyed by every possible means. It has been attempted to justify Capital Punishment on the plea of prescriptive right extending over thousands of years, as the penalty proved to be most effective for securing the safety of the State and deterring from crime. When, in the midst of the last century, philosophy took a new turn and extended its inquiries to law, the question of Death Punishment was brought within its compass. The results of these inquiries, however, were by no means satisfactory. Formalism and one-sidedness on the part of the inquirers account for this failure. Authors given to formalism fancied that they had exhausted a subject when they had found a striking formula. Some of the favourite formulas regarding punishment were:—Punishment is expiation, annihilation of the wrong, retributive justice, &c. But such formulas, however well selected, and comprehensive

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they may appear to the young student, suggest nothing either to the legislator or the judge. They do not enable us to arrive at a better understanding of the nature of man than we had before their invention—the less so because philosophers neglected to consult experience as to the motives which induce men to commit crimes, and as to the effects of punishments previously inflicted. Equally bad guides for legislators were the Hegelian school of philosophers, who endeavoured, by a philosophical apparatus, to justify the law as it stood.[1] A method previously tried and often recurred to, viz., by commencing with a state of nature, or the hypothesis that States were founded by social contract, was equally barren of results for penal legislation.

The inquiry by which it was intended to justify Death Punishment was based on two principles:—

I. JUSTICE.
II. EXPEDIENCY.

I. JUSTICE.—No theory seems so well adapted to justify Death Punishment as the so-called absolute theory, or justice-theory (*Gerechtigkeitstheorie*[2]). But this theory is based on so many different grounds, and has so many branches, that it is necessary to specify them:—

1. Moral retribution, in imitation of Divine justice, as a means of filling up the chasm in the moral world,

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[1] *Vide* HAYM'S *Hegel und Seine Zeit*, Berlin, 1857, p. 361, for well-founded objections to HEGEL'S *Philosophy of Right*.

[2] The author of this work was once captivated by the delusion that Death Punishment could be justified by the principle of justice.

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caused by crime; the legislator being bound to fashion his system according to the Divine pattern.[1]

2. The second division has for its object the restoration of the violated law in the higher order of the world.[2]

3. Crime is considered as contradicting Right, and punishment the means of removing the contradiction.[3]

4. Punishment is viewed as the means of abolishing the evil produced by crime.[4] Some considering penalties as the means of abolishing moral, and others juristical evil.

5. Another class define penal law as a realization of the idea of justice which requires that punishment—without having any other object—must follow crime; that the greatest crimes demand the severest punishments; so that, according to this view, Death Punishment for murder is indispensable, because no other penalty can be substituted for it; and, besides, great inequality would be manifested by allowing the criminal to live.[5]

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[1] *Vide* BEKKER: *Theorie des Deutschen Strafrechts*, i. pp. 71-81. How much in England, even now, a certain pietistic party is misled by theocratic views, can be learned from CLAY'S *Prison Chaplain*, p. 357. He boldly states, that the object is not the protection of civil society, but to carry out the justice of God, in whose name and according to whose will the legislator acts. Capital Punishment is accordingly attempted to be justified by reference to the command of God to punish Ahab with death!

[2] *Vide* SAVIGNY (F. C. von): *System des heutigen Römischen Rechts* (Berlin, 1840, in nine vols.), i. p. 26.

[3] HÄLSCHNER: *System des Preussischen Strafrechts*, i. p. 14.

[4] According to the views of Rossi.

[5] This is the view of Kant. *Vide* FISCHERS: *Immanuel Kant's Entwickelungsgeschichte*, Mannheim, 1860, ii. p. 221.

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6. Another favourite fundamental idea on which the philosophy of Penal Law is based, is that of expiation, or reconciliation. Punishment, and especially Death Punishment, is attempted to be justified, both by the desire of the murderer himself and that of the people, who see in the execution of the murderer an expiatory sacrifice.

7. Another theory attempts to justify Death Punishment by asserting that the criminal opposes his individual will to the general will of the law, and that by inflicting punishment, the law treats him in an analogous manner, and annihilates the individual by the general will.[1]

8. Another theory[2] considers punishment as a means for restoring the sanctity of the law. The destruction or suffering of the criminal is the manner in which the sovereign authority of God is manifested, in order that the will of the criminal may not prevail against the State and its established order.

The boasted justification of Death Punishment will be refuted, if we succeed in showing that not one of these so-called theories of justice establishes a principle which teaches the legislator, in a manner both plain and satisfactory to reason, under what conditions he may make use of the right of punishment, by what limits this right is defined, and the object aimed at by inflicting punishment. A strict examination shows that this theory is based on erroneous premisses, is satisfied with hazy and mystical formulas, attempts impossibilities, is refuted by the distinctive features of human nature and by expe-

[1] HEGEL'S view, *Rechtsphilosophie*, § 99-101, 220.

[2] *Vide* STAHL: *Philosophie des Rechts*, ii., p. 364.

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rience, and substitutes arbitrariness in place of a plain direction for the legislator. We must, in an emphatic manner, oppose that theory supported by many pretentious phrases, which attempts to found Criminal Law on the pattern of divine justice, but which is liable to all the objections that hold good against the theocratic system. It pretends that God has delegated His own justice to the earthly legislator, forgetting that man is destitute of all the means at the command of the Deity, for fully appreciating an action, and for knowing the mode by which God intends to maintain the harmony of the world.[1] Our whole Penal Law, viewed in this light, would be a mere presumption, because the legislator cannot possibly know whether God had not in a given case previously exercised His justice. This theory in vain tries to justify Capital Punishment—a justification which is only possible by adopting the ancient notion of a wrathful God who must be reconciled by sacrifice, instead of the Christian idea of a loving Father who educates sinful men and nations by other means than those at the command of the legislator.[2] Death Punishment cannot be justified by a theory which pretends to remove, by means of a penalty, a wrong committed, or the moral evil brought about by crime, or, as the high-sounding phrase runs, to fill up the chasm in the order of the world; for, generally speaking, the pretension to undo what has been done is contradictory to reason, and in the application to Capital Punish-

[1] *Vide* VON MOHL: *Encyclopädie der Staatswissenschaften*, p. 310.

[2] *Vide* good remarks against this theory in TREBUTIEN: *Cours du Droit Pénal*. p. 26. HELIE: *Du Principe du Droit*, p. 70. CONFORTI, p 204.

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ment, one asks in vain if by an execution a murder can be undone.[1] Nor can the legislator fancy that, by means of a penalty, he can abolish the moral evil of a crime. It is not within the jurisdiction of criminal law to take notice of the moral consequences of crime, nor is it possible, justly to appreciate the extent of the moral evil. A grave crime in the estimation of the law (even murder) may be a minor crime viewed in relation to society;[2] and, under certain circumstances, morally considered, no crime at all.[3] It is a matter for regret that, in recent theoretical works, the idea of paying the criminal back in kind, or the idea of revenge and retaliation, which, as talion,[4] was the offspring of barbarous times, has had a pernicious influence. All that can be conceded is, that retaliation by punishment is justified only so far as the criminal ought to be made to feel that the evil inflicted upon him corresponds to his misdeed, and is his just desert for the evil he has committed. Those who advocate retaliation, and desire to make the penalty commensurate with the crime, are not agreed on the principle. Kant, for instance, advocates specific equality, while Hegel advocates the so-called equivalent value.[5] He specially opposed that theory which (according to Kant) is

[1] *Vide* Mr. F. Hill on *Crime, its Amount, Causes, and Remedies*, London, 1853, p. 173.

[2] For instance, some one kills a man who is highly dangerous, and at whose death most people would rejoice.

[3] For example, a mother steps over the *pest cordon*, in order to save her child.

[4] Even the Canon Law (Law C., xxx., quæst. 3, cap. i.) says:—"Judex punit non delectatione alienæ miseriæ, quod est malum pro malo, sed delectatione justitiæ pro injusto, quod est bonum pro malo."

[5] Köstlin clearly shows, p. 425, how little Hegel's assumed retaliation by valuation can serve as a basis for regulating punishment.

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said to be founded on the ground of a specific equality between the punishment and the crime—a theory which is called absolute, because it demands punishment as an absolute necessity in order to satisfy the claims of justice. This latter theory leaves out of sight the fact that there is no absolute measure of punishment; that the action of every State with regard to penalties must be adapted to the prevailing circumstances in the interests of the State in question, and that, accordingly, criminal policy must point out to the legislator what is expedient; while, according to the rigidness of Kant's theory, important considerations —as, for instance, prescription, regard to the penitence of the criminal—would be entirely excluded. The fallacy of this theory is especially shown when Kant treats of the necessity of Death Punishment being inflicted on the murderer. In his reasoning, no notice is taken of the fact that it is quite an arbitrary assumption, based on the rude theory of talion, that death must be inflicted on him who has caused death, and that this punishment can have no substitute. Such an assumption, besides, can be refuted by showing that there are many degrees of homicide (even of murder), and that mercy cannot be excluded from the murderer himself, whilst, according to Kant, justice would be violated unless every man-slayer were put to death.

The theory of Stahl, which is based on the assumption that the criminal pretends to be superior to law, is altogether unsatisfactory. According to this view, he endeavours to justify Death Punishment as the means of forcibly overcoming the will of the culprit by killing him. Such an opinion is in contradiction to the nature of punishment, and would exclude the extreme penalty from those

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criminals who, by their contrition, render it unnecessary to subdue the will which is already broken. The theory of expiation, which has often been brought forward in justification of Death Punishment, is equally unsatisfactory. Human justice must not set before itself the object of working a change in the mind of the criminal—as, for instance, to bring about repentance—a state of mind which cannot be attained by carrying a law into effect. The assertion made by this theory, that by punishment society is to be reconciled to the criminal, springs, strictly speaking, only from revengeful feelings,[1] provides no scale for the degrees of legal threats—and must, consistently with itself, exclude punishment from those cases in which the criminal, by the intensity of his contrition, or by the sufferings which he has imposed upon himself, affords convincing proof that he feels the wrong he has committed. We must especially oppose the idea that the criminal suffers Death Punishment under the conviction that this is an expiation of his crime. This mystical phrase, which is entirely foreign to popular notions, and according to experience, has had its origin in a view of the criminal in most cases imparted by clergymen. Instead of instilling such a notion into his mind, it would be more rational to impress upon him the conviction that reformation, contrition manifested by deeds, would be the best way of expiating his crime.

Death Punishment has been justified on the ground of EXPEDIENCY by authors, and especially by men of practical experience. They look upon punishment as

[1] The question may be asked—what advantage can it be to the State to reconcile society to a man by putting him to death?

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the means of attaining certain ends in the interests of the State. As, for instance—

1. When the legislator considers fear and covetousness as motives of human action, and supposes that the perpetrator of a crime previously balances in his own mind opposite motives. Hence the legislator must so arrange the legal menace as, by the threatened evil,[1] to counteract the disposition to crime.

2. Feuerbach's theory (which is stated in a spirited manner) of mental deterrents is closely allied to the last. It is intended to influence the mind by threatening a greater evil as a counterpoise to the inducement to crime. Accordingly Death Punishment is justified in order to counteract the disposition to commit the most heinous crimes.

3. The general prevention theory (particularly advocated by Italian writers,) justifies punishments on the ground of the right and duty of the State to defend its subjects against the incontinency of their neighbours, —justifies, accordingly, Death Punishment as a counterpoise to the gravest crimes.

4. The so-called special prevention theory asserts that the criminal having manifested his dangerousness by his actions, the State must render him harmless, and in order to do so must employ penalties as a means of preventing fresh outbreaks.

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[1] This view is especially maintained by Bentham. GÖTTING (*Recht, Leben und Wissenschaft*, p. 117) truly says that Bentham, the adversary of Capital Punishment, arrives at a contradictory conclusion when he justifies Death Punishment on the plea that it appears to man as the gravest penalty, producing an awful impression on many criminals. *Vide* Appendix G. for the views of Mr. CHARLES NEATE, M.P., on the fear of death as a preventive of crime.

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5. Others consider the right of punishment when necessary to the State's self-defence. Punishment is inflicted on the individual who attacks the State by commission of crime, in order to ward off the danger threatened by fresh crimes.

6. Others assert that according to the nature of man the impression produced by the infliction of a great evil engenders the dread of the like evil for a similar offence, and thereby has a deterring effect both upon the criminal himself and those who are liable to fall into similar temptations.

The attempt to justify Death Punishment by any one of the theories enumerated must fail as soon as it is shown that they have no satisfactory basis. All of them are in common liable to the objection[1] that they make expediency—which is an undetermined quantity arbitrarily defined by the will of the stronger—the principle on which the right of punishment is based, instead of recognizing that the threat of punishment can only be effectual when acknowledged to be just, proportionate to the degree of the crime, and necessary,[2] while the legislator cannot justify or render effective the infliction of punishment merely on the plea that the law has threatened it. These theories of expediency are based on the erroneous premiss, that crime is a matter of calculation and balancing of motives

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[1] *Vide* HELIE: *Du Principe du Droit Pénal*, p. 84; Paris, 1855, where the objection is admirably stated.

[2] Hence we find that writers who follow the theory of expediency, but understand the right of punishment in a practical manner, modify their theory by combining it with that founded on a principle of justice. Thus do BAUER, RAUTER in France, GIULIANI in Italy.

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the means of the criminal; they arbitrarily assume a quantity of incitements to crime, in order to regulate the amount of the threatened evil to be inflicted; consistently with this view they must compel the legislator to estimate as highly as possible the danger threatening the State by a crime, and accordingly to enhance the legal menace as a means of warding off that danger in order safely to counteract it.[1] The theory of defence affords no principle for punishment, because it confounds the right of punishment with that of prevention, and because it has this drawback—that it induces the legislator to neglect the duty of taking advantage of the means at his disposal for prevention. The theory of self-defence leads to a similar conclusion, and violates all legal principles, by inflicting punishment under the disguise of self-defence, even against the disarmed enemy who has been rendered harmless.[2] The so-called special prevention theory is revolting, because it recommends a recourse to punishment on the plea that the culprit appears dangerous in consequence of the crime he has committed. This argument, on which the right of punishment is based, is delusive. According to this theory the right of punishment must be extended as much as possible. Death Punishment must be inflicted even for minor crimes; for instance, on habitual thieves; while con-

[1] This strictly appears when, consistently with this view, the facility for the commission of a crime—as, for example, the especial opportunity—is used as an argument in justification of menacing a severe punishment, as, for instance, for domestic theft.

[2] It violates all reasonable ideas of law when the State, on the plea of self-defence, sends the criminal to execution, after having imprisoned him, and possibly rendered him harmless through sufferings.

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sistently no punishment ought to be inflicted when the criminal is so situated as to be entirely incapacitated for repeating his crime. This theory, which proposes by the greatness of the threatened punishment to extinguish the criminal intention, can never serve as a justification of Death Punishment. This view, which can only justify the infliction of punishment on the ground that it has been previously menaced, is opposed to experience, because it is based on the erroneous supposition that the perpetration of a crime is preceded by a balancing of the motives for and against—and because it bases its threat of punishment on a certain magnitude of motives arbitrarily construed, assuming that pleasure and pain are divisible into fractions, whilst according to experience there is in the human heart only one ruling disposition which determines man in his actions. The theory disregards the fact that the deterring power of the law is based, not on the magnitude of the threatened evil, but on the certain expectation on the part of persons disposed to commit crime, that a penalty will be inflicted, and that accordingly punishment is less effective in the inverse proportion of the probabilities of escape.[1] The hope of the legislator to curb the mind of the criminal by certainty of the penalty, and to deter him by an innate dread of evil, is not well founded, because that hope rests on the supposition that persons disposed to commit crime have a clear perception of the evil which the law threatens to inflict. Experience teaches that,

[1] The experience which Lord Brougham communicated to the French Academy is important.—*Archiv des Criminalrechts*, 1851. p. 137.

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as a general rule, the criminal does not think at all of the threatened death penalty,[1] whilst in other cases the menace loses all its power on the criminal, who is merely, and to the exclusion of all other thoughts, occupied with a scheme how to avoid discovery.[2] How little this deterring theory answers the requisites of justice is best illustrated by the experience of Bavaria, whose Code so often violated the public consciousness of Right by the severity of its penalties and the rigidity which bound the judges to the gravest penalties without taking into account the most important extenuating circumstances.[3] In no other punishment is the intention of deterring so often defeated—the probability of judicial acquittal or mercy counteracting fear in the culprits.[4] In respect to this point the experience which induced recent legislators to abolish the publicity of executions should not be disregarded; nor the other experience, that persons guilty of heinous crimes had shortly before been eye-witnesses of an execution.[5]

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[1] Note, for instance, a thief who is surprised *in flagrante delicto*, and thereby comes to the sudden determination to kill the unexpected witness—a case which, as it is well known, is classified as murder by the Codes of several nations.

[2] Mr. F. HILL, in his work *Crime, its Amount, &c.*, p. 170, states the remarkable fact, that after the execution of the forger Fauntleroy, a merchant was constantly haunted by the idea how to perpetrate that forgery in a more cunning manner, so as to elude detection.

[3] FEUERBACH himself, after learning the operation of his Code from practical experience, changed his views, as may be clearly seen from a draft which only came to light after his death. In the last years of life he was opposed to Death Punishment.—FEUERBACH'S *Leben und Wirken*, i., p. 232.

[4] Shown by BERNER: *Abschaffung der Todesstrafe*, p. 15.

[5] We speak more at length on this point in the sixteenth chapter of this work.

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Since improvements in the system of imprisonment have been attempted, and the reformation of even the greatest criminals proved to be possible, all thoughtful jurists were startled by the question whether punishments could any longer be justified, by inflicting which (as Death Punishment) reform was rendered impossible; whether accordingly it did not correspond with the moral nature of man and the interests of the State, frankly to acknowledge that reform was the object of punishment. Thus began new theoretical inquiries on the principle of reform. But the evil was, that the one-sided view taken of the subject afforded an opportunity to the adversaries to dispute the correctness of the principle altogether. One of the greatest mistakes of the advocates was in interpreting the sentence in the light that the criminal should only be kept in prison and submitted to attempts at reform so long as it was necessary for this purpose, and to be immediately dismissed so soon as his reformation was effected.[1] The main point of the controversy was the meaning and extent[2] implied in the term reformation, and the question whether punishment should have any object besides reformation. The true meaning of the principle of reformation is that the legislator—while maintaining the proportion between punishment and

[1] From this mistaken view it came to pass that authors of ability contended against the principle of reformation. For instance, HELIE: *Du Principe du Droit Pénal*, p. 90; V. WICK: *Ueber Besserung*, p. 14; KÖSTLIN: *System*, p. 398.

[2] Especially whether the object was a moral or civil reformation. *Vide* RODER: *An Pœna malum esse debet—Zur Rechtsbegründung der Besserungsstrafe*, Heidelberg, 1846. With which compare GÖTTING: *Recht, Leben und Wissenchaft*, p. 114.

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crime—shall aim at the reformation of the criminal, and adapt the penalty and the mode of its execution to this end. He must accordingly remove every obstacle to reformation, avail himself of every element in human nature to further reformation, and open up a view to the culprit of the advantages he can secure by reforming himself.[1] As soon as it can be shown that even the greatest criminals can be reformed by proper prison discipline, (which we shall prove from important observations in a future chapter,) Death Punishment is deprived of its support.

The following principles as postulates of reason must guide the legislator in exercising the right of punishment:—

I. The State is the necessary form for the development of humanity. The unfounded notions regarding a state of nature, or the formation of the State by covenant, must be banished from the inquiries on the right of punishment.

II. The operation of the State can only apply to civil life, and to that which the State grants and protects to men living together in society. All attempts at the realization or imitation of divine justice, or at the restoration of the order of the world by punishment, must be set aside.

III. The State is entitled to apply every means for establishing and protecting Right.

[1] How far reformation can be an object of punishment, *vide* MITTERMAIER: *Die Gefängniss-verbesserung*, pp. 78, 125; MITTERMAIER: *Ueber Gefängnissfrage*, p. 75; the essay of "A Practical Man," in the Transactions of the Society for promoting Social Science, Glasgow, 1860, p. 111; BERNER: *Abschaffung der Todesstrafe*, p. 21; GÖTTING, p. 67; CLAY'S *Prison Chaplain*, pp. 292-297.

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IV. This implies the right on the part of the State of inflicting and menacing punishment; in doing which it must follow the general consciousness of Right according to which evil proportionate to the magnitude of the guilt must be inflicted on the disturber of Right; and this punishment must be so managed as to effect the reformation of the individual punished, the prevention of crime, and the security of society.

V. Punishment is, however, only one of the means for the protection of Right, and, indeed, the most extreme, which ought only to be applied when the other means at the command of the State are unavailing.

VI. The means of punishment which the State can make use of can only consist in the withdrawal of those rights which the State has either conferred or which it maintains; the right of the State can never extend to the infliction of a punishment by which an individual would be robbed of the possibility of further development as a human being.

Life, it must be remembered, is the gift of God, and the necessary condition of the development and moral culture of man. The duration of man's life is determined by the Almighty; whatever punishment interferes with His will by curtailing man's existence is unjust. It is only the notion of a wrathful deity that must be reconciled—a notion diametrically opposed to the idea of Christianity—which could lead to the belief in a right of inflicting a punishment that deprives a man of his life.[1]

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[1] *Vide* an excellent article on this view of the subject in *Dublin Review*, August, 1860, p. 472.

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CHAPTER VI.

THE POLICY OF CRIMINAL LAW.

THE legislator can only hope to arrive at a law answering to the cravings of the country for which it is designed, when, within the boundaries prescribed by justice, he is guided by a sound criminal policy. Criminal policy must be his guide as to the expediency of his enactments, and especially with regard to making provision for the temporary and variable interests of his country, and to rendering the laws effective by adapting them to the condition and peculiarity of the inhabitants. Just as a wise physician selects his remedies, according to their special efficacy, but with due regard to the peculiar constitution and particular condition of his patient, so the wise legislator must adapt his penalties to the peculiarities of the men for whom they are intended. The more copious the material of carefully-collected facts, the more serviceable will it be as a basis on which to erect the legislative structure. This is especially the case with regard to the maintenance of Death Punishment. Whoever examines the theoretical labours and the debates of Legislative Assemblies on the subject, must regret the deficiency of the material with which

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those who have to come to a decision must be acquainted before they can arrive at a well-founded conclusion. In recent times, Governments have often asked the advice of men of wide experience before they proposed a law on a given important subject—as, for instance, free trade. The question may fairly be asked, why the responsible ministers of other countries have not acted in a similar way as those of England have done?—viz., by appointing Royal Commissioners, who take the opinions of men of experience, whose callings afforded them special opportunities for observing criminals—to wit, inspectors of prisons, physicians, and especially clergymen who have conversed with condemned culprits during their last hours on earth—besides officials, judges, advocates, and citizens from the various ranks of society. The statements of these witnesses ought to be published, as is the case in England, in order to afford an opportunity to the newspapers to express an opinion upon them.[1] We shall give directions as to the course which ought to be pursued in these inquiries, so as to render them valuable.

I. There ought to be a report, stating the number of crimes committed in every country, especially those threatened with death:—

1. The average number of crimes ascertained during a long series of years.

2. The number of capital sentences pronounced during a long period.

[1] The reports of individual officials, or opinions of courts of justice, have not the same value, because they are frequently based on insufficient evidence.

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3. It will be of great importance to ascertain, whether the number of those crimes, for which Death Punishment has been abolished, has increased or diminished.

4. It is equally important to ascertain the effects of the clemency exercised, as a rule, by a sovereign in the remission of Death Penalties.

5. It ought to be ascertained what effects the general abolition of Death Punishment in a country has had on the number of capital crimes committed.

II. Another direction is to collect facts regarding the proportion of executions to capital sentences, and to ascertain the number of pardons granted, and what effects resulted therefrom.

III. It ought to be ascertained whether or not the views of the people are in harmony with the enactments of the Penal Law.

1. Have the majority—or, at least, a great portion of the people—an aversion to Death Punishment? Does this aversion operate as an impediment to judicial proceedings, by showing that crimes are not denounced, or that the testimony of witnesses is given in such a way as to render a capital verdict impossible?

2. Are verdicts returned with the addition of extenuating circumstances, or other reasons for mitigating the penalty?

IV. It is important to inquire what impression is produced by the sentence and execution.

A.—With regard to the conduct of the condemned culprits immediately after the passing of the sentence, and immediately before its execution.

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B.—With regard to the body of the people.

(*a*). Whether they approve or disapprove of the condemning sentence.

(*b*). Is the impression produced, so far as it can be ascertained, wholesome or otherwise?

(*c*). Are proofs forthcoming in favour of restricting the publicity of executions?

(*d*). Has the interest, which the people take in executions, a wholesome influence on the diminution of crimes?

V. A careful inquiry into the behaviour of those culprits guilty of capital crimes, whose sentences have been commuted by mercy, is indispensable.

Was their conduct while in the penitentiaries such as to warrant the inference that prison discipline has a corrective influence on criminals?

VI. It is important to ascertain whether or not there are cases of innocent persons having been executed.

Those of our readers who are acquainted with the state of statistical inquiries will join in the regret that in all countries, except England, very little has been done towards furnishing materials wherewith satisfactorily to answer the above questions. The author has for a series of years endeavoured to collect, in various countries, at least a few facts which will be laid before the reader. Before giving them, he desires to warn those interested in the subject, against drawing from the number of crimes too rash conclusions, for or against Death Punishment. Crimes are diminished by causes which do not appear in statistics;—for instance, greater severity in, or better management of preventive measures

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(to wit, the police force), or improved political circumstances (as diminution of party feeling), improvement in the social and economical conditions, the diffusion of culture, and the better regulation of prisons. On the other hand, the number of crimes is increased by other causes as well as the withdrawal of constraint. On a close examination of the motives which lead to the commission of crime, it will frequently appear that a capital crime has its origin in peculiar local causes[1] or causes of rare occurrence;[2] accordingly such instances cannot be adduced as an argument for or against Capital Punishment. It is certain that grave crimes are committed in a State even when the general moral tone is healthy; consequently the inference, that by the existence of Death Punishment or the greater frequency of executions the crime would have been prevented, is not justified. Particularly with regard to murder (almost the only crime now punished with death), special attention must be paid to the fact that the distinction between murder and manslaughter which legislators and writers given up to formalism consider very easy, is, in reality, very difficult. It is very difficult to distinguish murder from manslaughter in cases of killing committed after a long and exasperated enmity, which may have been

[1] For instance, when on the boundary where a great deal of smuggling is carried on there is a deadly enmity between the smugglers and a passionate, rough excise officer, which leads to murder. Crimes are not unfrequently caused by local and transitory circumstances; so that in some districts no act of murder or arson is committed for years, whilst these crimes often occur in other districts of the same country. *Vide* MITTERMAIER'S essay in Hitzig's *Annalen*, 6 Heft, p. 369; Faider, in Bulletin de la Commission de Statistique en Belgique, vol. iv.

[2] As, for instance, when a brother kills the seducer of his sister.

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augmented by the barbarity of the father, or by long-continued ill-treatment of the wife on the part of her husband. Besides, in many States, judges and juries are compelled by the wording of the law to consider as murders crimes which do not spring from profligacy.[1]

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[1] For instance, in cases of killing by the express desire of a sweetheart.

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CHAPTER VII.

STATISTICS OF CRIMES COMMITTED AND CAPITAL SENTENCES PASSED IN VARIOUS COUNTRIES.

In turning first to the criminal statistics in the GERMAN STATES, and especially in AUSTRIA,[1] we find that in the years from 1829 to 1841, 479 capital sentences were passed.[2] In 1842, 44 (15 executed); 1843, 30 (8 executed); from 1845 to 1848, however, 357, (only 27 executed), capital sentences were passed. In the year 1849, 60 persons were condemned (6 executed). In 1856, 122 capital sentences were passed, and for 39 pardons were granted.

[1] The figures following in the text relate to the whole of Austria, except Hungary, Croatia, Serbia, Transylvania, and the Military Boundary. The numbers are based upon official statements published, but not within general reach.

[2] In Hungary, Croatia, Serbia, and the Banate, there were besides passed, 261, and in Transylvania 51, capital sentences. In the whole of Austria, therefore, except the Military Boundary, 791; only 272 were executed. We remind our readers that on October 20, 1803, a court decree was published after which death should only be inflicted when the gravity of the crime and the individual peculiarities of the criminal excluded all hope of reformation. According to a table given in Hye (*Das Oesterreichische Strafgesetz*, p. 41), by ordinary proceedings from 1803 to 1848, 1304 capital sentences (of which 121 were for high treason, 170 for forgery of State papers, 84 for arson, 911 for murder) were passed, but pardon was granted in 856 cases.

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With regard to PRUSSIA, we have an explicit table on the capital sentences passed from 1826 to 1843, taken from the official documents of the Minister of Justice;[1] accordingly, in those years there were in the Rhenish province (where the Code Penal obtains), 189 (only 6 executed); in the other provinces, 237 capital sentences were passed (96 executed); among them were 135 sentences for murder on Ascendants, 34 for infanticide, 12 for arson accompanied with the loss of human life. In the statement from which we quote, it is remarked how much less the number of capital sentences would have been if the draft proposed in 1847 had been in legal operation; only 187, instead of 426 capital sentences would, in that case, have been passed. The great importance of this comparison will be pointed out afterwards. According to a recently published table,[2] from 1818 to 1854, there were 988 capital sentences passed in Prussia, 534 for murder, 137 for manslaughter, 124 for infanticide, 96 for arson, 32 for counterfeiting coin and 12 for high treason.[3] The capital sentences passed since the introduction of the new Penal Code and trial by jury deserve special attention. According to the statistical tables, capital sentences were passed as follows:—In 1854, 37; 1855, 49; 1856, 41; 1857, 57; 1858, 29; 1859, 26. Of these there were for murder,—1854, 32; 1855, 44; 1856, 35; 1857, 12; 1858, 24; 1859, 23. The

[1] Printed in *Preussisches Justizministerialblatt* of 1848, p. 247.

[2] *Mittheilungen des Statistischen Bureaus*, in Berlin, 1856, Nos. 13-15.

[3] On an average, therefore, 26½; but varying much in different years. There were, for instance, 1841, 14; 1851, 60 capital sentences passed.

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Prussian Code, as it is, still punishes manslaughter—in two cases with death. Accordingly, the proportion of capital sentences for this crime is also worthy of remark; they amount, in 1854, to 4; 1855, to 3; 1856, to 2; 1857, to 7; 1858, to 4; 1859, to 2.[1]

With regard to BAVARIA, the published reports show that since the new Penal Code of 1813, on an average, 7 capital sentences had been passed yearly;[2] that from 1834 to 1838, 19 (15 for murder, 1 for robbery, 3 for arson), were passed. In Rhenish Bavaria, where the Code Penal obtained, in the same time, 34 capital sentences (6 for infanticide), were passed. During the eleven years from 1837–38 to 1847–48, only 41 capital sentences were passed in the seven old districts.[3] In the four years from 1850–51 to 1853–54, 115 capital sentences were passed in these seven districts (1850, only 25; 1852, 20; 1853, 42); 26 persons were executed (in Upper Bavaria, 10, of whom 9 were for murder). In SWABIA and NEUBURG, no execution took place. In the years from 1854–55 to 1856–57, 68 capital sen-

[1] In Westphalia, no capital sentence was passed in 1854 and 1855.

[2] According to the *Amtliche Beiträge für Statistik in Baiern*, von v. HERMANN, München, 1853, p. 66, there were, from 1832-33 to 1836-37, 29 capital sentences passed. In many districts—for instance, Unterdonaukreis, Obermainkreis—in five years, only one capital sentence was passed. In the Isarkreis, in the year 1833, none; in the year 1837, 7 sentences were passed.

[3] According to official statistics, 88 cases of murder were notified in 1846-47,—17 cases more than in 1845-46. In some districts—for instance, in the two main districts—there was, in the 11 years stated in the text, only 1 capital sentence passed; in Lower Bavaria, however, 16. It is remarkable that, in 1844, in the whole of Bavaria, not one capital sentence was passed; 482 general inquiries for murder were commenced in the 11 years alluded to.

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tences were passed (in Upper Bavaria alone, 25). Although in 1854, 8 capital sentences were passed in that district, the number in 1855 rose to 10. Of the 68 condemned persons, 24 were sentenced for qualified murder, and 7 for simple murder. In the year 1857, the sentence of death was pronounced in 12 cases (10 for murder and 2 for arson), against 16 persons. In the year 1858, capital sentences were passed against 23 persons (10 for murder, 13 for robbery); in 1859 there were 21 (12 for murder, 9 for robbery); in the year 1860, 12 (8 for murder and 4 for arson), were condemned to death.

In the KINGDOM of SAXONY,[1] 158 capital sentences were pronounced from 1815 to 1838 (of these, 15 were for murder, 11 for robbery and murder, 4 for poisoning, 20 for qualified theft, and 62 for arson). With regard to arson, it appears that while from 1815 to 1830, as a rule, only one sentence a year was passed, in 1835 there were nine sentences passed—two of the culprits only were executed. In 1837, 10 sentences were passed for arson; for the subsequent years there are no statistics at our disposal.[2] From 1856 to 1860, 12 persons were sentenced to death (for murder only).

In the KINGDOM of WÜRTEMBERG, from 1816 to 1823, 24 capital sentences were passed; from 1831 to 1833, there were 18. In the year 1835–36, 2; 1836–37,

[1] According to official statistical tables in *Archiv des Criminalrechts*, 1840, p. 460.

[2] When the new Code was revised, the Minister (v. Wächter, *Das Königl. Sächsische Strafgesetzbuch*, p. 178) declared that, up to the most recent time, cases occurred in which, without offending the feeling of Right in the people, Death Punishment could not be dispensed with.

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5; 1837–38, 4; 1838–39, 7; 1839–40, 0; 1840–41, 2; 1841–42, 1842–43, 1 in each year; 1843–44, 4; 1844–45, 1; 1845–46, 0. By the laws of 1849 and 1853, the number of crimes punishable with death was diminished; and in the year 1856, 2; and in each of the years 1857 and 1858, 1 sentence was passed. According to a table of recent date (in *Der Schwäbische Merkur*), the number of crimes, speaking generally, in Würtemberg, has greatly decreased. While the total number in 1848 amounted to 20,613, the number in each of the years from 1856 to 1860 was little more than 16,000 (1860, 16,800). The number of murders fell from 11 in 1854, to 6 in 1855, to 3 in 1856 and 1859; but in 1860, 9 are again recorded.

In the KINGDOM of HANOVER, from 1850 to 1856, 38 capital sentences were passed. Whilst in each of the years 1850 and 1852 only 2 persons were condemned—there were 5 in 1851. The number rose in 1853 to 8; 1854, to 9; 1855, to 7; and fell again in 1856 to 5. The sentences passed were for murder, with the exception of 3 for manslaughter, which took place in 1854.

In the GRAND DUCHY of BADEN there were (according to *Gemeines Recht* and the Penal Edict of 1803) in 1829, 7; 1830, 8; 1831, 3; 1832, 12; 1833, 7; 1834, 7; 1835, 8; 1836, 9; 1837, 7; 1838, 4 capital sentences passed. In 1844, 2; 1845, 3; 1846, 4 persons were condemned to death. It was not until 1852, when trial by jury was introduced, that statistics of crime were again published. Accordingly we find that in 1852, 3; 1853, 4; in each of the years 1854, 1855, 1856, and 1860, 3; 1859, 2 were condemned to death. Neither in 1857 nor in 1858 was there a capital sentence passed.

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With regard to BRUNSWICK, we learn that under the Government of the Duke Charles William no death sentence was passed, and since 1817 only 2 such sentences have taken place.[1] Since the introduction of trial by jury, from July 1, 1853, to July 1, 1854, only 1 capital sentence was passed. In subsequent years no such sentence has been passed, the persons convicted of murder being sentenced to imprisonment with hard labour.

In ENGLAND a great change has taken place with regard to the number of sentences of death passed and carried into execution, the number of crimes legally threatened with Capital Punishment having been more and more restricted—seventy years ago the number of crimes threatened with death amounted to 240—while public opinion became more and more opposed to the extreme penalty. In 1817, 1,302 capital sentences were passed; the number fell gradually to 1,100, 1,000, but rose in 1831 to 1,601. After the abolition of Capital Punishment for several crimes, the number of capital sentences diminished from 931, in 1833, to 480, in 1834. From 1834–38 the number of sentences varies between 523 (1835) and 438 (1837). Since 1838 a still greater decrease has taken place, the numbers being in 1838, 116, while in 1839 they were 54. It is especially remarkable that the number of accusations for murder, notwithstanding the increase of the population, absolutely decreased, there being in the years from 1836 to 1842, 61 accusations fewer than in the years from 1830 to 1836, and 93 cases fewer than

[1] STROMBECK: *Entwurf eines Strafgesetzbuchs*, p. xxvi.

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in the years from 1812 to 1818; the number of executions in the years last mentioned amounted to 91, whilst from 1836 to 1842 the number of executions was only 50. According to a table which gives the executions for fifty years, the number was from 1800–10, 802; from 1811–20, 897; from 1831–40 only 250, and from 1841–50, 107 executions are reported. More recent reports show that the number of capital sentences fell from 70 in 1851, to 52 in 1859, and to 48 in 1860.[1] Most of the sentences passed were for murder, and these likewise showed a decrease; being, in 1859, 18; 1860, 17. The number of executions in 1859 was 9, and in 1860, 12.

In SCOTLAND there has been a surprising decrease of crimes and capital sentences. Whilst in 1823 the number was 32; 1824, 16; 1825, 9; 1826, 16; and in 1827, 14,—there were in 1828 only 7; 1829, 9; 1833, 9; 1837, 3; 1841, 5; 1842, 1845, and 1846, *none;* 1847, 2; 1848, 4; 1849, 5; 1850, 3; 1851, 1; 1852, 4; 1853, 6; 1854, 1; 1855, 2; in each of the years 1856 and 1857, 3 capital sentences were passed. In the years 1858 and 1859 no capital sentence was passed; 1860, 4 persons were condemned, but none executed.

The history of capital sentences in no country is more remarkable than in IRELAND. Whilst in 1829 the number of capital sentences was 295, and in 1831, 309; 1834, 319,—the number fell, in 1845, to 13; and since 1855, to 5 in each year. To what extent crimes depend on the political condition of a country is specially illustrated in Ireland. Political excitement and rancorous party spirit that gave birth to a formidable unlawful

[1] Vide *Judicial Statistics*, 1860, p. xix.

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league,—which intimidated even less depraved persons, and destroyed the sense of Right and the respect due to the life of political adversaries,—led to the commotions of 1848. During this year 45 capital sentences were passed, and even in 1850, 43 persons were accused of murder, but the number gradually diminished as the excitement wore off. Arson—a crime springing mainly from a feeling of revenge—was, during this period, so frequent that, in 1850, 50, and 1851, even 160 persons were accused; but the number fell so soon as the excitement abated. In 1856, 19 persons were accused of arson, and in 1858 there were as many as 27.

The statistical reports of FRANCE, with regard to the efficacy of Death Punishment, are instructive. In 1825 (when the first criminal statistics were published), we find there were 980 persons accused of capital crimes, of whom 134 were sentenced to death. In 1826, 150 were condemned. For murder 60 sentences were passed, and 59 executed. Notwithstanding this severity we find the number of capital crimes increased. Commencing with the year 1832, important legal enactments came into operation, viz., jurymen being empowered to mitigate the ordinary penalty by qualifying their verdict with the addition of extenuating circumstances, which had the effect of lowering the penalties one or two degrees; this was especially important in the cases of crimes threatened with death. In 1826 the number of capital sentences passed, as already stated, was 150; in 1833 they were diminished to 50. Whilst in 1826 59 persons were executed, in 1833 there were only 25. In 1837, 33 capital sentences were passed. Since 1851 we find that increased severity in the condemnations

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has prevailed. In 1851, 45; 1854, 79; 1855, 61 capital sentences were passed.[1] Whilst in 1857 the capital sentences amounted to 58, in 1858 they were 38, and 1859, 36; the persons accused of murder in 1858 were 196, in 1859 they were 186. In what respect these variations depend upon the extenuating verdicts of juries will be shown in a subsequent portion of this work.

With regard to BELGIUM, we have very important statistical tables relating to the capital sentences passed.[2] The period from 1769 to 1807 was a sanguinary one. In 1801, 90; 1802, 85; 1803, 86 capital sentences were passed. From 1808 the numbers fell considerably, amounting in some years only to 23, in others to 25. Since 1814 the numbers fell still farther; in some years there were only 8, and in 1823 there were only 6. From 1828 there was an increase, the number rising in single years from 18 to 20 (in 1830 only 2 capital sentences were passed). If we divide and distinguish two periods—that of the dominion of France up to 1814, and that of Holland—we shall find that in the former period many —300—capital sentences were passed for theft accompanied with violence, and 39 for arson. For murder, 379 death sentences were passed during the same period; whilst in the second period the number amounted only

[1] It must, however, be remarked that the number of accusations for murder decreased. In 1851 there were 280, while in 1855 there were only 210; but infanticides increased. In 1851 they numbered 164; 1853, 190; and in 1854, 198.

[2] The statistics brought before the Chambers by the Government, in 1834, embrace the capital sentences passed from 1796 to 1833. Another table, containing the years from 1800 to 1849, is given in the *Statistique Générale de la Belgique; Exposé de la Situation du Royaume*, 1852, p. 359.

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to 113. This is so much the more remarkable, as in the period, during which the greatest number of capital sentences were passed and the greatest number of executions took place,[1] the number of the gravest crimes increased every year; whilst in the second period, during which capital sentences were much fewer and executions of rare occurrence, heinous crimes decreased. From 1831 to 1849, 461 persons (of whom 23 in their absence,) were condemned to death. We must not omit to state that capital sentences for crimes which were not murder, were frequent. Of the 438 who were personally tried, 161 were accused of murder, and 277 of other crimes. Besides, there is a great difference apparent in the number of capital sentences passed in various provinces. For instance—in Brabant, there were six capital sentences passed in one year (1846); whilst in Namur, from 1831 to 1849, only 4; from 1831 to 1842, no capital sentence was passed. It is also worthy of remark, that the occurrence of several capital sentences passed in a single year, was in consequence of a band of criminals being tried whose crimes had been committed in previous years.[2] In 1850, there were in Belgium 43 capital sentences passed—16 being for murder, 8 for arson, and 5 for infanticide. In 1851, the total number was 32—15 for murder, 1 for parricide, and 11 for arson. In 1852, the total number was 80, of which 4 only were for murder, 1 for rape and murder, and 1 for homicide and theft. In 1853 the total number was 27—9 for murder, 1 for false coining. In 1854, the total number was 32,

[1] In the year 1801 there were 76, and in 1803, 60.

[2] Vischers, in *Zeitschrift*, viii. p. 124.

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of which 15 were for murder. In 1855 there were, altogether, 32, including 1 for parricide, 12 for murder, and 1 for attempt to murder. In 1856 there were 20 capital sentences pronounced, of which 5 were for murder and 8 for arson.

With regard to the capital sentences passed in the Northern States, we have official statistics relating to DENMARK, SWEDEN, and NORWAY. Denmark and Sweden are especially worthy of notice, inasmuch as they then retained the ancient severity of the penal laws, by which death was frequently threatened. In Denmark, from 1832 to 1840, 123 capital sentences were passed; from 1841 to 1855 there were 205. In consequence of the severe nature of these laws, such sentences were passed for manslaughter, rape, incest, and bigamy. In 1844, the penalty of Death was pronounced against a woman for her third act of adultery; one sentence of death was passed for sodomy in each of the years 1844, 1845, and 1851. In Sweden, up to recent times, the number of sentences passed, and even executed, was very great;[1] but also, in late years, the number of sentences passed has been considerable. In 1850 there were 85 persons sentenced, of whom 36 were women; in 1851, 85; 1852, 84; 1853, 87; 1854, 89 sentenced to death. As to the executions, we shall speak in our next chapter. In Norway[2] there were, in 1856, 3 persons sentenced to death; in 1857, 3; 1858

[1] According to the official statistics, there were, in 1830, 20; 1831, 21; 1836, 21; in each of the years 1834 and 1835, 16; and in 1837, 15. Vide *Archiv des Criminalrechts*, 1840, p. 453.

[2] The Penal Code of 1842 is framed in a mild spirit, and threatens only a few crimes with death.

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and 1859, only 1 in each year; 1860, 3 persons were condemned. In all these cases the sentences related to murder; but frequently other crimes were connected with it—as, for instance, in 1857, burglary, theft, and false coining. The sentences passed in 1860 included a case of crime committed in 1838. In one case in 1856 the murder was committed from exasperation, by a daughter against her own father, in consequence of his cruel treatment of her mother. The intention of the daughter was to shield the beloved mother from further ill-treatment.

It may be worth while to give an account of the capital sentences passed in the great Italian States, NAPLES and PIEDMONT.[1] From Naples[2] we have official statistics regarding the sentences passed from 1831 to 1850; the total number 641, of which 23 are for parricide, 160 for the murder of husband or wife, 19 for murder by poisoning, 229 for simple murder, 11 for rape with manslaughter, 186 for qualified theft with manslaughter. The numbers vary much in different years; whilst in 1831, 79; 1832, 109; 1833, 95 capital sentences were passed, the number fell in 1836, 1849, 1850, to from 30 to 36. In 1851, 50 persons[3] were condemned to death, of whom 14 were for political crimes, 10 for murder, and 16 for murder and theft combined.

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[1] No trustworthy statistics could be obtained regarding the States of the Church and Modena. As to Tuscany, we have given an account already.

[2] *Statistica Penale Comparata per l'Anno* 1850, 1851.

[3] The causes which led to the commission of the crimes are stated to have been selfishness for 37 per cent., domestic broils for 7 per cent., adultery and lust for 14 per cent., revenge of family honour for 9 per cent.

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In Piedmont[1] there were, from 1815 to 1823, 227; from 1824 to 1839, 229; from 1840 (when the new Code was introduced) to 1855, 200 (of which 138 since the introduction of public and *vivâ voce* trials), capital sentences passed. According to the recent communications on the sentences passed from 1855 to 1860, the total number of those in the district of the Court of Appeal at Turin, was, in these five years, 71 (1855, 12; 1860, 20); in the district of Genoa, 17; in the district of Casale, 16. It must be remarked, that several of the sentences here recorded were passed against absent persons—for example, 19 in Turin. It is matter for surprise that there occur so many cases of highway robbery (*grassazioni*) connected with manslaughter—23 in the five years in the district of Turin. It is also worthy of notice that many death sentences were reversed by the Court of Cassation—as, for example, 7 in the district of Turin, and 2 in that of Genoa.

[1] The Government has published official statistics which embrace a period of 40 years—*Statistica Giudiziaria degli Stati Sardi.* They are a model of criminal statistics.

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CHAPTER VIII.

CAPITAL SENTENCES AND EXECUTIONS.

THE legal menace of death, the announcement of the penalty in the sentence, deserves, no doubt, the full attention of the inquirer; but the *execution* of Death Punishment claims that attention in a still higher degree. We shall accordingly examine—

I. The relation of sentences passed to the number of executions in various States.

II. What effects have been observed in those States in which the Government, for a long period, has suspended the execution of capital sentences?

III. Does experience show whether those crimes, in respect to which Death Punishment has been abolished, have increased or decreased?

IV. Has the total abolition of Capital Punishment had any influence on the increase or decrease of crime?

I. With regard to AUSTRIA, we remind the reader of the Court decree of 1803 already referred to, according to which, only those criminals should be executed who, by the gravity of their crimes and the

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incorrigibility of their nature, left no hope of their reformation. According to the statistics given in Chapter VII. for the years from 1803 to 1848, 1,304 capital sentences were passed, pardon being afterwards granted to 856 persons. Of 911 persons sentenced to death for murder, 421 were executed; of 121 sentenced for high treason, 2 were executed; of 84 sentenced for arson, 18 were executed. Speaking in a general way, we may say that two-thirds of those condemned to death were pardoned. It has been remarked in a former chapter, that the number of death sentences have increased; with regard to the granting of pardon, however, there has been a great difference in different years. From 1822 to 1830, in every year more than the half of the culprits were pardoned. For instance, in 1822, of the 33 sentenced, 19 were pardoned; 1824, of the 28 sentenced, 18; 1829, of the 29 sentenced, 20 were pardoned. From 1829 to 1841, of the 791 sentenced, there were 519 pardoned; even of the 199 of the culprits sentenced for murder, 161 were pardoned. Of the 78 persons condemned for the murder of husband or wife, the half were pardoned: of 62 persons condemned for killing their own children, only 1; and of 76 condemned for forging public bonds, not one was executed. In the year 1831, of 42, only 14; 1832, of 69, only 21; 1833, of 48, only 13; 1838, of 67, only 18 were executed. In 1829, of 75 condemned, 30; 1830, of 50 condemned, 26; in 1834, of 82 condemned, 32 were executed. In the year 1843, of the 30 persons condemned, 22 were pardoned. Of the 357 persons condemned from 1845 to 1848, only 27 (11 in Galicia) were executed, so that 330 were pardoned. In

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1856, 122 capital sentences were passed (among them a great many for high treason, 8 of which were for contempt of court); of 59 condemned for murder, 39 were pardoned,[1] but in all the other crimes—for instance, in 6 cases of arson—no pardon was granted.

With regard to PRUSSIA, an official table[2] contains the statement that, from 1826 to 1843, of the 189 persons condemned to death in the Rhenish provinces, only 6; and of the 237 condemned in the other provinces, 94 were executed. Of the 12 persons condemned for arson, in which a man lost his life, 1 was executed.[3] Of the 29 persons condemned in the old provinces for the murder of illegitimate children, only 3 were executed. Of the 11 persons condemned for manslaughter of Ascendants, only 1, who had manifested special savageness, was executed. Of the 48 condemned in the Rhenish provinces for murder, only 5; of the 78 condemned in the other provinces, 76 were executed.[4] It is worthy of remark that here also the experience was confirmed regarding the difficulty of

[1] According to the Austrian Code, the judges are not allowed to remit Death Punishment, whatever the number of the extenuating circumstances may be. They must submit the case to Imperial mercy.

[2] In the *Justizministerialblatt*, 1848, p. 247.

[3] The reporter, who had the Ministerial records at his disposal, states in the *Ministerialblatt*, p. 248, that the eleven who were pardoned were not better than those executed.

[4] The great disproportion between the small number of death sentences confirmed in the Rhenish, and the great number in the other provinces, is explained by the fact that the Ministers were in the habit of having the sentences passed in the Rhenish provinces examined with respect to the point whether, according to the regulations of the Criminal-Ordnung, the guilt was proved, and that, in those cases where the criminals made no confession, a proposal for royal mercy was tendered.

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strictly defining the distinction between murder and manslaughter.[1] According to the statements[2] relating to 37 years (from 1818 to 1854), 988 death sentences were passed and 286 confirmed; for murder, 534 condemned, and 249 executed; for infanticide, 124 condemned, of whom 2 were executed. With regard to the proportion of those condemned to those pardoned, several periods may be distinguished:—1. That from 1818 to 1824, during which, on an average, 10 a year were executed. 2. That from 1825 to 1833, within which 10 executions took place annually, with the exception of 1829, when there were 12; and 1832, 1833, 1834, when 2 in each year were executed. 3. From 1839 to 1845, when 5 to 8 a year were executed. 4. Of 1848, in which none; and 1849, in which 3 executions took place. 5. Beginning with 1850, when greater severity commenced; in 1851, under the rule of the new Code, 19 of the 60 capital sentences; 1852, 14 of the 39 sentences; 1853, 23 of the 40 sentences; 1854, 20 of the 37 sentences; 1855, 28 of the 49; and 1856, when 26 of the 41 sentences were executed.[3]

In the kingdom of BAVARIA, of the 3 persons condemned in 1832, 2 were pardoned; while the 10 persons condemned in the Rhenish district, from 1832

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[1] Not unfrequently (*vide* cases quoted in the *Justizministerialblatt*, 1848, p. 252), the verdict was, in the first Court, murder; in the Court of Appeal, manslaughter; in other cases, the Ministry found manslaughter, where both Courts had returned a verdict for murder.

[2] *Mittheilungen des Statistischen Bureaus* in Berlin, 1856, Nos. 13-15.

[3] For murder there were, in 1853, 20; 1854, 17 executions. Of those condemned for murder in 1856, 18 confessed (3 of them being pardoned); 11 did not confess: 4 of them were pardoned.

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to 1835, all were pardoned. Of the proportion between the sentences passed since 1850—when trial by jury was introduced—and the executions, official statistics show that of the persons condemned from 1850 to 1854, 26 were executed, and 89 pardoned (35 for murder, 16 for burglary, and 11 for arson). The greatest number of executions took place in Upper Bavaria. In the years from 1854 to 1857, 68 were condemned, and 18 of them executed. In 1854–55, 4 persons; 1855–56, 9; 1856–57, 5 were executed; while, during the same three years in Upper Bavaria, again 10 executions took place (12 murderers being pardoned). Of the 23 death sentences passed in 1858, 7 were carried into execution (4 for murder, 3 for robbery). In the year 1859, 21 were condemned to death, including 12 for murder, 5 murderers were executed; 1860, 12 persons were sentenced to death, and 2 executed.[1]

An important observation, militating against the effectiveness of Death Punishment,[2] is that in the seven years from 1850 to 1857, during which, on an average, six executions took place each year, 156 cases of murder, manslaughter, and bodily injury from which death ensued, were committed; whilst in fourteen years, from 1836 to 1850, in which only 1 execution a year took place, the number of those crimes amounted also only to 155.

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[1] Notwithstanding the many executions, the number of capital sentences rose, in 1857, to 57. We regret that, in spite of the pains we have taken, we have not succeeded in obtaining statements with regard to the punishments inflicted since 1857. We learn, however, that the number was very small.

[2] *Neueste Nachrichten*, 1860, No. 153.

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Of WÜRTEMBERG we learn, that of the 24 death sentences passed in the years from 1813 to 1823, 14 were executed; of the death sentences passed from 1834 to 1838 none were executed. Of the 7 death sentences passed in the lowest court—1838–39—2 were executed, and two repealed by the superior court. As has been already stated, no sentence was passed in 1839–40; the 3 sentences passed in 1840–42 were executed; the 1 passed in 1842–43 was remitted. The 5 sentences passed in the years from 1843–45 were executed; none were passed in 1845–46. All the criminals sentenced to death for murder from 1855 to 1858 were executed.

In the KINGDOM of SAXONY, during several years, from 1815 to 1838, no execution took place, although many capital sentences were passed—as, for instance, 7 in 1833, 5 in 1834, 5 in 1836, 10 in 1837; whilst in other years,—for instance, 1835,—of the 9 sentences passed, only 2 were carried into effect. Of the 158 sentences passed from 1815 to 1838, only 30 were executed. With regard to more recent times, we learn that of the 11 persons sentenced from 1856 to 1860, 4 were executed, and all for murder.

Of the ELECTORATE of HESSE, we know that from 1826 to 1837, 10 persons were sentenced to death and 7 executed.

In the GRAND DUCHY of BADEN there were several years during which no Death Punishment was inflicted —as, for instance, 1830 and 1831; although 8 sentences were passed in 1830. In 1833, 7 sentences were passed, but none executed. Of the 7 condemned in 1829, 3 were executed; in the other years up to 1838, only 1 execution a year took place. In the years from 1844 to 1846 there

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was no execution (in one case the superior court set aside the judgment). In the years 1845 and 1852 [?], 1 execution took place; in 1853 there were 3. In each of the years 1855, 1856, 3 sentences were passed (with 1 execution) [?]; in 1854, of the 3 sentences passed, 2 were carried into effect; in 1857–58, there was no capital sentence passed; in 1859, there were 2 sentences passed, but pardon intervened; of the 3 sentences passed in 1860, only 1 was carried into effect.

In NASSAU, according to the statistics produced, from 1826 to 1835, capital sentences were pronounced against 49 persons, 7 of whom were executed; this includes 37 persons who were condemned by court-martial in 1831 for the murder of the Cadet Vigelius; so that, excluding this case, 12 death sentences were passed in 10 years, 3 of which were carried into execution.

With regard to ENGLAND, the official statistics show that from 1810 to 1832, 759 persons were executed; in single years, as 1817, there were 115; and in 1821, 114. From that time, it is true that the number of capital sentences does not fall off; but the number of executions shows a decrease; so that, with the exception of from 1827 to 1829, when, in single years, the number of executions amounts to 70 and even 79, the yearly average is 50. From 1832 the proportion is altered, in consequence of Death Punishment having been that year abolished for a great number of crimes; the decrease in the number of executions is still greater. We will show the proportion, in as far as it relates to murders. In 1829, of 12 persons condemned for murder, 11 were executed; in 1841, of 20 condemned, 10; in 1843 of 22 condemned,

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16; in 1846, of 13 persons sentenced, only 6 were executed. Whilst in the years 1800–1810, 802—from 1811 to 1820, 897 persons were executed,—there were, from 1831 to 1840, 250; from 1841 to 1850, 107 executions. In 1851, 70 death sentences were passed, including 16 for murder; 10 of these were executed. In 1859, 52 capital sentences were passed, and 9 carried into effect; in 1860, of 48 persons condemned, 12 were executed. For many years past, capital sentences for murder only have been confirmed.[1]

In SCOTLAND, there were still, in the year 1823, 16 persons executed of the 32 condemned; in 1826, of 26 condemned persons, only 8 were executed; in 1829, there were 9 condemned and 6 executed; in 1837, there were 3 condemned and 2 executed. From 1851, the number of executions falls so, that in most years only 1 execution took place, excepting 1852, 1857, when there were 3 in each year. In 1858 and 1859 no capital sentence was passed; in 1860, 4 persons were sentenced to death, but all of them were pardoned.

In IRELAND, the ratio which death sentences bears to executions is most surprising. In 1823, of 241 death sentences, 61 were carried into execution; in 1829, of 295, 60; in 1828, of 211, 21; in the year 1850, of 17 condemned, only 8 were executed; until, in the year 1855, the annual number of executions falls to 4.

In FRANCE, repression was very severe from 1825 to 1832, although slightly mitigated since 1828.[2] From

[1] For full statistics of murder in England and Wales, *vide* Appendix K.

[2] In 1825, of 134 capital sentences, 111; in 1826, of 150, 111; in 1828, of 114, 75; in 1830, of 92, 33; in 1831, of 108, 25 were carried out.

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1832, the introduction of extenuating circumstances effected a diminution of capital sentences, death being confined to the gravest cases (1833, 50; 1834, 31). The King, who was personally averse to Death Punishment, could only with difficulty be induced to confirm capital sentences; hence the number of executions was, in the year 1833, 34; 1835, 39; 1838, 34. The number of capital sentences suddenly rises in 1854 to 79, with 34 executions. In 1853 there were only 39 sentences passed, and 27 executed; in 1856, of 46 persons sentenced to death, 17 were executed; in 1857, of 58 sentenced, 32; in 1858, of 38 condemned, 23; and in 1859, of 36, 21 were executed.

The mildness of the policy of BELGIUM is a marked contrast to the severity of France. Whilst under the French Government, great austerity prevailed (of the 407 sentences passed from 1800 to 1809, according to official statistics, 323 were executed), under the sway of Holland greater mildness was gradually manifested (of the 150 sentences passed from 1814 to 1829, 74 were executed). We find that since the accession of the present king, Death Punishment is rarely carried into effect. Of the 438 sentences passed from 1831 to 1849, only 28 were executed; from 1850 to 1856, 204 sentences were passed, of which 22 were carried into effect.[1]

In the KINGDOM of the NETHERLANDS we have severity and mildness manifested in turns. While from 1811 to 1820, 42 persons were executed, and 39 pardoned, from 1831 to 1840, 17 persons were executed, and 57 pardoned; from 1841 to 1850, of the 125 capital

[1] In 1852, of the 14 sentences passed none were carried into effect.

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sentences, only 10 were executed; in 1851, of the 7 sentences passed, none were confirmed.[1] Of 13 persons sentenced in 1854, and of the 14 sentenced in 1855, only 1 in each of these years was executed; of the 8 sentenced in 1856, 3; in the years 1857 and 1858, none were executed; while the number of sentences passed in 1857 was 7.

In DENMARK, of the 205 sentences passed from 1841 to 1855, 80 were carried into effect, 125 being pardoned. As a rule, this was the case for other crimes besides murder; but even for murder, the death penalty was not unfrequently (21 men and 7 women) remitted by prerogative of mercy.

In SWEDEN, executions were formerly, and even up to recent times (*vide* last chapter), very frequent.[2] The most remarkable change, however, took place after the accession of the Crown Prince, who had before spoken out emphatically against Death Punishment; and when he became king, could hardly be prevailed upon by the pressure of his Minister to confirm capital sentences. The consequence was, that of 85 condemned persons in 1850, only 5; of 85 in 1851, 8; of 89 in 1852, 2; of 87 in 1853, 11; and of 89 in 1854, 8 were executed.

In NORWAY, of 11 persons condemned from 1856 to 1860, the sentences were confirmed only in 3 cases.[3]

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[1] *Vide* KÖNIGSWARTER in the *Séances et Travaux de l'Académie des Sciences Morales*, 1857, p. 138.

[2] We learn from the work of the (then) Crown Prince OSCAR on *Punishment and Prisons*, p. 13, that during the seven years previous to 1840, on an average, 43 persons per annum sentenced to death were pardoned.

[3] With regard to a sentence for a murder caused by revenge in 1859, the excitement in Norway was so great (the culprit being highly respected on account of his former conduct), that the King was obliged to grant pardon.

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In looking upon the fate of the persons sentenced to death in NAPLES from 1831 to 1850, we are surprised to see so many capital sentences cancelled by the Court of Cassation (in 1832, 36; 1833, 40), with the result that, in the second judgment, instead of death, another penalty was substituted (only in 72 cases, imprisonment; in 44, only *absolutio ab instantia*). Of the 641 persons condemned in 20 years, only 55 suffered death; in many a year, only 1 execution (1834); in others, 2 (1836) took place; in later years there were 4 in each year. Of the 50 persons sentenced to death in 1851, only 7 were executed.

In PIEDMONT there were, of the 227 persons condemned to death from 1815 to 1823, 198 executed; and of the 229 condemned from 1824 to 1839, 166; in single years to 1824, of 12 condemned, 11; in 1839, of 13, 7 were executed. From 1840 to 1855, of the 200 sentenced to death, 109 were executed. With regard to pardons, it appears that the Government often showed great clemency, there being only 1 execution in 1841, and 1 in 1843. All of a sudden, the King thought himself obliged to become severe again, when, as a rule, mercy was refused. For instance, in 1853, of 26 condemned persons, 14; 1854, of 19, 13 were executed. In more recent times, great severity is also maintained. From 1855 to 1860, of those tried in Turin, 32 persons were executed, and 13 pardoned; whilst of those tried in Genoa, 5 were executed, and 1 pardoned.

II. The effects which appeared in those States in which Death Punishment was virtually abolished form an important subject for examination, as the penalty

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had not been inflicted for a long time, mercy having, in all cases, intervened.

From what has already been said, it is evident that in several States for many years no execution has taken place. The case of TUSCANY is, in this respect, most remarkable. In this country, it is true, Death Punishment had been re-introduced for certain crimes in 1795, but the penalty had not been carried into effect, and no increase in the number of capital crimes took place even during the French occupation.[1] The fact that there has been no execution from 1831 till the present time is especially important. Even during times of excitement, when Death Punishment was re-enacted by the New Code—although one capital sentence was passed for a revolting crime—the culprit was pardoned. The statistical tables show no increase in heinous crimes, and all the reports of the trustworthy officials justify the inference that the re-introduction of Death Punishment is not necessary.[2]

The reports from BELGIUM deserve equal attention: from 1830 to 1833 no capital sentence was carried into effect, and, nevertheless, the number of grave crimes has not increased.[3] The same thing has been observed in Bavaria and in Rhenish Bavaria, where for several years all persons condemned to death have been pardoned;

[1] *Vide* communications of CARMIGNANI in the Journal ii., p. 413.

[2] Shown by the President PUCCINI in the Journal xii., p. 230; by the President PUCCIONI in his commentary, *Codice Penale*, ii., p. 128. To the same effect are the letters I (Mittermaier) have received from the general director of prisons, Signore Peri in Florence.

[3] As appears from the official statistics, which are accompanied with judicious remarks by VISCHERS in the *Zeitschrift für ausländische Gesetzgebung*, viii., p. 120.

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in Baden, where for a number of years there have been no executions. We have similar testimony regarding OLDENBURG, where, during the government of Duke Peter, no execution took place; under the late Grand Duke only one murderer was put to death.[1] But another experience is furnished, viz., that the longer no capital sentence has been confirmed in a State, the more the people become accustomed to the abolition of Death Punishment, and when again an execution took place, manifested the greater sympathy for the poor wretch, which was often accompanied by an expression of disapproval of the Government—the case in question being compared with previous graver ones in which mercy was granted to the culprits; taunting comments being added, that now once again a sacrifice was chosen as an example of official energy. The severe party which is accustomed to look upon cruel punishment as a means of good government, express their discontent at its mildness by availing themselves of every opportunity for drawing the attention of the public to the alleged disadvantages of frequent mercy, and for urging the authorities to manifest their earnestness again by an execution. That such was the case, was proved in Belgium, where, in 1835, the Government yielded to pressure from without,

[1] A special kind of virtual abolition took place in some of the States of North America; for instance, in Maine, where, according to the law of 1837, criminals, it is true, were condemned to death, but at the same time to prison with hard labour, and were kept in prison until the governor resolved to have the extreme penalty inflicted. We see from a report of 1860 that seven persons thus condemned were kept in prison; since 1837 no one has been executed, and yet there has been no increase of murders.

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by ordering an execution. In 1834 a capital sentence of the year 1828 had been carried into effect; but in the Chamber and the press Ministers were severely reproached for a too hasty submission to the clamours of a party.[1]

III. With regard to the influence of the laws by which for certain crimes the previously threatened Death Punishment was abolished, statistics afford nothing but favourable accounts.

This is especially the case in England, where statistics show that the abolition of Death Punishment does not tend to the increase of crimes, but, on the contrary, tends to strengthen the power of repression. This is very evident with regard to horse-stealing, rape, burglary, and especially forgery. While from 1821 to 1830 for horse-stealing, 46; for forgery, 44; from 1831 to 1840, for rape, 18; arson, 53, were executed, there has been no increase in these crimes since the abolition of Death Punishment.[2] When the measures for abolition were discussed in Parliament, the same fears were frequently uttered which now-a-days are often expressed with regard to abolition in general. Experience has shown that such alarms are altogether unfounded.

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[1] In the Senate—sitting of Jan. 31, 1835—discontent at the mildness of the Government was expressed; contrary to fact, the increase of crime by clemency was alleged. The intimidated Minister gave way, and proposed the execution, which was carried into effect at Courtrai, in a province which for nineteen years had not witnessed the formidable spectacle. *Vide* very pertinent remarks by VISCHERS in the *Zeitschrift für ausländische Gesetzgebung*, viii., p. 119.

[2] Vide *Judicial Statistics*, and PHILLIPS'S *Vacation Thoughts on Capital Punishment*, London, 1858, p. 32.

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IV. The influence of the total abolition of Death Punishment is the most important point for consideration.

We here refer in the first place to the facts stated respecting TUSCANY, where from the year 1786 to 1795 Death Punishment was entirely—since 1795, at least virtually—abolished; then again it was by law abrogated from 1847 to 1854, and although re-enacted from 1854 to 1859, was never carried into effect, until, in the latter year, the penalty was abolished again. Official statistics show[1] that during the time of the abolition no increase in capital crimes took place; that especially from 1847 to 1854 the number of heinous crimes was not augmented. We learn from the testimony of officials of high rank in Florence[2] that down to our own time the most experienced functionaries see no occasion for the reintroduction of Death Punishment. On the effect of the abolition of Capital Punishment since 1860, it might be difficult to arrive at a definite conclusion.

With regard to the facts furnished by the AMERICAN STATES in which Death Punishment has been legally abolished, we have official statements, especially from Michigan[3] and Rhode Island. According to these, in

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[1] *Vide* chap. ii., p. 40, *foot-note.*

[2] From verbal communications and letters which the author (Mittermaier) received from Signori de Bologna (president of police), Lami (procurator-general)—both of them afterwards became Ministers,—Peri (director-general of prisons in Tuscany), it appears that there was no cause for the reintroduction of Death Punishment.

[3] The report of the Committee on Bills and Petitions for abolition of Capital Punishment (New York, 1857) contains (p. 20) a letter of the Secretary of State, in which he says that it is true that since the abolition,

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Michigan the number of sentences passed for murders, particularly such as would have been capitally punishable as murders of the first degree, has not increased. In Rhode Island an increase has taken place, but, nevertheless, later demands for the re-enactment of Death Punishment have been rejected.

With regard to OLDENBURG, where, since 1849, Death Punishment has been abolished, the statements received on application to high functionaries and the experienced director of prisons, Hoyer, show that the re-enactment of Capital Punishment has not been demanded either by the people generally or by the jurists; on the contrary, public feeling had become still more favourable to abolition, since examples had been furnished of the entire reformation of some culprits, imprisoned for life on account of murder. According to communications from Hoyer, in the end of 1861 there were 9 persons condemned for life in the penitentiary; 5 women condemned to the house of correction for an undefined period (2 of them for infanticide);—of all these two only were obdurate. Of 3 women guilty of poisoning, 2 behaved in such an exemplary manner as to be considered reformed.[1] Of 3 men condemned to prison for life for arson, 1, whose education had been entirely neglected, is now reformed.

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in 1846, 23 sentences for murder were passed, but that; considering the population had increased 100 per cent., the number should have been 37, instead of 23; and that the 23 cases included 5 murders of the second degree which were not threatened with death. (*Vide* for recent American statistics, Appendix F.)

[1] Two old women who had committed murder are insane; a woman guilty of infanticide is entirely reformed, but declines pardon.

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Respecting NASSAU (where Death Punishment has been abolished since 1849), we have statistical tables relating to the period from 1851 to 1858. According to them, in 1855, 4 persons were accused of murder (3 of whom were acquitted); 1856, 3 (1 acquitted); 1857, 6 (4 acquitted); 1858, 6 (all acquitted). From 1855 to 1858, 5 persons were condemned to the house of correction for life—1855, 3, 1856, 2, 1857, 0, 1858, 0 were condemned. We see from these figures that no increase of crime followed the abolition of Death Punishment; the courts of justice, whose opinion was asked by the Government, consistently recommended that the enactment should not be reintroduced.

In the CANTON of NEUCHÂTEL, in which the penalty of death was abolished in 1854, the statistics show an increase of heinous crimes; accusations of murder, however, are not made. The number of crimes committed in 1854 and 1855 is even less than in 1853. The highest penalties inflicted in 1855 were 2 imprisonments for 15 years; 1856, 2 imprisonments for life—(the first time since 1848). No demands have been made for the re-enactment of Capital Punishment.

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CHAPTER IX.

CAPITAL PUNISHMENT AS A DETERRENT.

THE value of a penalty depends mainly on the fact, that those who are called upon to co-operate in the administration of justice are agreed as to its expediency; for if it were disapproved of by the people and the judges, means would be resorted to in order to render the law inoperative. Experience has shown, that this is especially the case with Capital Punishment, when any important portion of the population does not approve of the infliction of the penalty. In this respect the expression of opinion on the part of an English prison chaplain[1] is remarkable, that with the growing aversion to Death Punishment in England, judges, jurymen, counsel, witnesses, and prosecutors combine, in a kind of conspiracy, in order to avert Death Punishment. In this manner the power of repression, and the respect due to the law, are diminished. This appears (1) with regard to the subjects who are injured by crime, or are called upon to give evidence as witnesses—the former being easily prevented from giving information[2] relating

[1] The Rev. Mr. CLAY: *The Prison Chaplain, &c.*, p. 87.
[2] *Vide* PHILLIPS: *Vacation Thoughts*, p. 26.

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to the crime before the court, and induced to arrange their evidence in such a way[1] as to ward off the threatened penalty. (2.) The same effect is produced with regard to persons called upon to act as jurymen; a man who would have been an excellent juror, from conscientious motives declines to act, and thus deprives society of his co-operation, because he frankly confesses his disapproval of Capital Punishment, in consequence of which he is not admissible.[2] (3.) The aversion of jurymen has especially this effect,—that in crimes threatened with death (*a*) they have recourse to the so-called pious[3] perjury of underrating the matter in question, when a correct estimate would have brought the culprit to death;[4] (*b*) that the jurymen are

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[1] For instance, by stating that the amount of the inflicted damage was less, or, that they do not accurately recollect the aggravating circumstances.

[2] This is especially the case in America, where every one called upon to act as a juryman is asked the question, whether or not he disapproves of Death Punishment—the affirmative being sufficient to disqualify him from serving. It thus frequently happens, that a great number of respectable men are prevented from acting. *Vide* MITTERMAIER's *Das Englische Strafverfahren*, p. 395. In France a case occurred in which a juryman declared himself to be opposed to Death Punishment, whereupon the court imposed upon him the fine of an absentee.

[3] This is the significant phrase used by Blackstone in his Commentaries, vol. iv., p. 239 (4to edition, 1769). He says "that the mercy of juries will often make them strain a point, and bring in a larceny to be under the value of twelvepence, when it is really of much greater value: but this is a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge."

[4] This was the case in England so long as theft for forty shillings was punishable with death. There is a statement extant to the effect, that within fifteen years the jurymen in 535 cases declared the value to be only thirty-nine shillings. *Vide* PHILLIPS's *Vacation Thoughts*, p. 23.

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disposed to acquit the culprit;[1] or (*c*) that in cases which require unanimity, they manage to come to no agreement;[2] or (*d*) that they deny in the verdict the circumstance on the supposition of which the infliction of Death Punishment depends; for instance, "intent" in the case of murder, so that the verdict found must be for a minor crime not threatened with death—manslaughter.[3] (4.) The manner in which the juries avail themselves of the right conferred upon them to modify the verdict by the addition of extenuating circumstances deserves special attention. They employ it as the means of compelling the court to substitute a milder penalty for the ordinary one. Our readers will remember that according to the desire of Louis Philippe, who was opposed to Death Punishment, the privilege of finding extenuating circumstances was granted to juries by the law of 1832. He intended to give them an

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[1] In America, in Massachusetts, there were, in 10 years, of 60 persons accused of capital crimes, 28 acquitted.—*Law Reporter*, March, 1846, p. 494. In England, of the 70 persons accused of murder, in respect to 10 a true bill was not found by the grand jury, 32 were acquitted, and 8 declared insane. In 1860, 23 of the 44 accused of murder were acquitted. In France, in 1858, of 146 accused of murder, 31 were acquitted; extenuating circumstances were admitted with regard to 83. In 1859, of 150 accused of murder, 37 were found not guilty.

[2] In Massachusetts, of the 29 persons accused of murder from 1832 to 1843, 13 were found not guilty; with regard to 10, the accusation of a minor crime was admitted; and with regard to 3, the jurymen could not agree. In New York no agreement was come to, in 1857, in 38 cases; and in 1858, in 22 cases.

[3] In France, the verdict was, in 1858, for 32 persons accused of murder, so modified that temporary imprisonment, for 47 so that imprisonment for life, instead of death, was inflicted. For 24 persons accused of infanticide the verdict was so modified, that the sentence was lowered to that of a misdemeanor.

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opportunity for expressing their views on the application of Capital Punishment, and thereby contributing to the gradual abolition of the penalty, or at any rate to its limitation — and at the same time to strengthen the power of repression, by rendering juries more disposed to return a verdict of guilty, which they would not have done so long as they were certain, that the effect of their verdict would be the execution of the culprit. It is now of importance for us to follow the march of the proceedings of the courts of justice in France. In this respect the statistics show,[1] that juries frequently made use of the right conferred upon them;[2] this was often, but without reason, found fault with by jurists,[3] who are advocates of the deterring theory. Most frequently the privilege was resorted to, where the jurymen, shocked by the menace of death held out by law, which they considered to be too severe, wished to evade the penalty. Hence we find that in France, in 1855, in 320 cases threatened with death; 1858, in 328; 1859, in 315—extenuating circumstances were found; and with special regard to accusations of murder, 1855, in 91; 1858, in 78; 1859, in 73 cases: in respect to accusations of manslaughter connected with other crimes, 1855, in 60; 1858, in 10; 1859, in 9 cases: for infanticide, 1855, in 110; 1858, in 158; 1859, in 140 cases: for poisoning, 1855, in 29; 1858, in 30; 1859, in 17 cases: for arson, 1855, in 56; 1858,

[1] Abstracts in *Archiv des Criminalrechts*, 1857, p. 182.

[2] In 1855, the addition of extenuating circumstances was made to 3,065; in 1858, to 2,701; in 1859, to 2,511 verdicts.

[3] *Vide* MITTERMAIER'S proofs in v. GROSS: *Zeitschrift für Strafrechtspflege*, iii., p. 90.

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in 53; 1859, in 56 cases. That for parricide also the law of extenuating circumstances was resorted to, cannot surprise those who are acquainted with the severity of the French Code.[1] Similar observations have been made in Geneva,[2] where juries have the privilege of adding extenuating, or even greatly extenuating circumstances.

[1] The French Code enacts, as, unfortunately, the Prussian Code does also, that manslaughter against Ascendants, even after the greatest provocation, is to be punished with death; whilst experience shows that just here by great provocation—for instance, ill-treatment on the part of the father—guilt may be greatly mitigated. This is shown in GOLDTAMMER'S *Archiv*, ii., p. 311.

[2] The addition of greatly extenuating circumstances has in Geneva the effect that the penalty, even if it were death, can be lowered to a minimum. In the year 1849, of 17 condemned culprits the verdict of guilty was found for 7, with the addition of greatly extenuating, and for 8 with that of extenuating circumstances.

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CHAPTER X.

CAPITAL SENTENCES, EXECUTIONS, AND THEIR EFFECTS.

THE effect of the legal menace of Death Punishment has an especially practical bearing, when a decision has to be come to, whether or not the sentence passed shall be carried out. We propose to consider in this chapter :—

I.—THE EFFECTS OF THE SENTENCE.

II.—THE EFFECTS OF THE EXECUTION.

I. As regards the effects of the *sentence*, it is of especial importance that now, for the first time, the serious question becomes prominent, whether or not the sentence shall be confirmed. The significance of mercy and the position of those on whom the granting of pardon devolves, will form the subject of separate inquiry (Chapter XII.); if, however, apart from this consideration, we only look upon the effects resulting from the fact of the passing of a capital sentence becoming known, the following observations demand special attention.

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1. As to the impression which the sentence produces on the culprits, it cannot be denied that, when the last ray of hope of acquittal has disappeared, a state of mind[1] is brought about which borders on despair. By listening, however, to clergymen and functionaries, who during the final sad moments stand beside culprits, endeavouring to comfort them,[2] we learn that their dispositions greatly differ; much depends on the temper and degree of culture, and especially on the fact, whether or not there are any religious feelings left, or whether they were only induced to commit crime by a combination of unfortunate circumstances. In the last case, a disposition to sincere repentance might with greater certainty be calculated on. Such a character might easily be brought to a religious submission, under the unavoidable fate which he has brought upon himself by his own guilt; whilst in the case of those rough individuals whose education has been entirely neglected,[3] or whose criminal course of life has engendered

[1] Very properly the experienced ARNOLD, in the *Gerichtssaal*, 1858, p. 464, draws attention to the fact that the disposition of the man, who is about to commit a crime, must not be confounded with the state of mind of him, who has carried his criminal intent into effect.

[2] It is a pity that there are so few such statements extant; those we possess we owe mainly to English clergymen, recorders, and sheriffs, whose evidence has been taken by Royal Commissioners. We find such evidence in the second report of the Commission of 1836, and in the reports of 1847 and 1848, with the appendices; besides in PHILLIPS's *Vacation Thoughts*, p. 70, and Mr. NEATE'S *Considerations on Punishment of Death*, 1857.

[3] The chaplain of Newgate states, that when in his official capacity he was preparing for her fate a woman condemned to death, he spoke of Christ. She asked the question, "Was He not a leader of a great band of robbers?"

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violence and a callous indifference to dangers, neither repentance nor proper behaviour can be expected. Experience teaches also, that in many condemned culprits, what appears to be repentance is a kind of despair, or only feigned in order to secure a favourable answer to the petition for pardon; whilst in others (especially the totally depraved), an attempt is made, by courageous behaviour in facing death, to earn the admiration of their fellows.[1]

2. Experience shows that the impression produced by executions on the spectators is insignificant, consequently the deterring effect cannot be great. It must be admitted that the pronouncing of the sentence by the judge—who in England puts on a black cap—is calculated to excite feelings of terror in those present; but experience also shows, that very frequently an unwholesome impression is produced.[2] It often happens that the culprit's fellow-prisoners, after the passing of the sentence, receive him with levity, and that the

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[1] The Governor of Newgate assured the author, in the year 1851, that among the condemned — especially of those belonging to the criminal class—were many who prided themselves in dying with great courage and spitefulness, in order to leave behind them a reputation such as their companions would approve of. A case occurred in England, when, during an execution, a voice—that of the mother of the criminal—was heard among the crowd, exclaiming, "Son, I hope you will die courageously, like your father!" See, besides, BERENGER: *De la Repression*, pp. 466-68.

Mr. Alderman Harmer's evidence before the Royal Commissioners, 1819, which will be found in Appendix H. is of great importance.

[2] The Newgate chaplain stated, that not unfrequently when the condemned makes known his sentence to his fellow-prisoners, at their request, they shout to him, "Well, you have lost your game—nothing ventured nothing won!"

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behaviour of the relatives of the condemned person affords no evidence of any deterring effect.[1]

8. Special attention is due to the fact that the passing of a capital sentence produces an excitement in the minds of the people, who exert themselves to the utmost—as, for instance, by petitions, articles in newspapers, &c.—to exercise a moral pressure on the Government in order to secure the pardon of the culprit.[2]

II. The effects produced by executions on the spectators, are especially important. The legislator might expect, that the spectators, being impressed with the feeling that civil society performs its thankless task of killing a citizen in consequence of his crime, will leave the place of execution in a frame of mind calculated to keep them, for a long time, from the perpetration of similar offences. According to experience, however, this expectation, alas! is frequently doomed to disap-

[1] It is shown in the evidence before a Parliamentary Committee, that the police—when a man had been executed for forging bank-notes, and his corpse had been given up to the relatives—detected the nearest friends of the executed culprit concealing forged notes in the mouth of the corpse.

[2] Such has been the case in England, especially in the recent case of Smethurst, whose condemnation was, in the opinion of respectable physicians and lawyers, as stated in their petitions to the Secretary of State, considered unjust. [In connection with this part of our subject, we invite attention to an excellent article in the *Westminster Review*, No. 50, April, 1864. The writer says truly, that the reprieve of Hall was wrung with difficulty from the Home Secretary at the eleventh hour. In a previous sentence, the writer pithily says, "that if Wright was not hanged because Townley was pardoned, certainly Hall might have been pardoned if Wright had not been hanged."] Similar popular excitements prevailed on the authorities to grant pardon (1857) in Florence, and (1860) in Norway.

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pointment. The behaviour of the multitude hastening to an execution presents a sad picture of gross depravity, a low curiosity desirous of watching the features and conduct of the culprit, with an inhumanity which, as soon as the drop falls, calls forth the mad exultations of the crowd, just as when the curtain drops after the performance of a ludicrous farce.[1] The conduct of the spectators immediately after an execution, indulging in vulgar witticisms and coarse ribaldry, shows that no wholesome effect can be expected from the exhibition. Besides, the fact stares us in the face, that in England, as well as in other countries, professional pickpockets are in front of the gallows, busily engaged in their calling. A very different impression is produced on the minds of those not present at the execution. As a rule, they disapprove of executions; or, at any rate, entertain doubts as to the right of the State to inflict them.[2] We claim, however, the attention of our readers to other important experiences.

1. According to the observation of competent persons, the impression produced on the spectators by an execution, depends greatly on the behaviour of the culprit,[3]—whether he dies giving signs of repentance and contrition, or, on the contrary, remains obdurate, and indulges in utterances indicative of great barbarity

[1] The evidence given before the Royal Commissioners of 1856, "On the present mode of carrying into effect Capital Punishment," is of great importance. See also Mr. Edward Webster's paper read before the Society for Promoting the Amendment of the Law, on December 1, 1860, and Appendix I.—"An Execution in London in 1864."

[2] *Vide* important statements furnished by prison chaplains and other functionaries in the Second Report on Criminal Law, 1836.

[3] Mr. CHARLES PHILLIPS'S *Vacation Thoughts*, p. 71.

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and depravity.[1] In the former case, a feeling of pity for, and interest in the culprit, is excited in the spectators, who often think that a man thus put to death, if allowed to live, might be reformed, and even rendered capable of doing some good service to society. In the latter case, a feeling of exasperation against the criminal is awakened in many of the spectators; but frequently also doubts are expressed regarding the right of the State to execute the man, of whose depravity society itself, by having neglected the necessary means for his education and the prevention of his crime, shares a portion of the guilt.

2. Experience teaches also, that executions not unfrequently exercise a pernicious influence on the spectators,—even prompt them to the commission of murders,—the official shedding of blood, with all its atrocities, awakening in men, as the sight of blood does in the lion, a slumbering feeling of bestiality.[2]

3. A peculiar effect is produced when a man, quite impenitent, deaf to all religious admonitions, is brought

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[1] Such was the case during the execution of Sachenbacher in Munich, in 1857. When the barber cut off the long beard of the culprit, he shouted, "Shave me nicely, that I may get a pretty wife in heaven." When on his way to the scaffold, he indulged in lewd utterances.

[2] The Procurator-General of Naples, Tartaglia, told the author, in 1845, that he had always persuaded the King not to confirm capital sentences, but that once behind his back, a certain clique had prevailed upon the King to confirm a sentence. Tartaglia instructed several trustworthy persons to mix with the crowd, in order to ascertain what they said. The reports were to the effect, that the execution exercised no deterring influence, but on the contrary, called forth expressions of coarse ribaldry. The procurator-general affirmed, that from that time the number of cruel murders increased at Naples.

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to the scaffold. According to the views of theologians,[1] an execution is the sacrificial death in which the repentant criminal submits to the penalty which he has recognized as well deserved; they must therefore admit that it is a contradiction in terms to execute a man who has given no signs of repentance at all.[2]

4. The worst impressions are, according to experience, produced in those cases in which the execution is not successfully carried out; when, for instance, the executioner, through his awkwardness, gives—at least apparently—unnecessary pain to the culprit;[3] this may

[1] *Vide* the periodical published at Rome, *Civiltà Cattolica*, Roma, 1853, I. p. 63; 1860, p. 589.

[2] The author was in Rome when, at seven o'clock one morning, a murderer was brought to execution. The crowd rushed through the streets. No procession appeared. The remark was heard, "Non è penitente." This continued the whole of the morning. At eleven o'clock the procession arrived, but the murderer had not yet confessed, and was at last executed, though impenitent.

[3] For a detailed account of the horrible execution of Misserndörfer in Munich, when the executioner hacked six times, see BEHREND'S *Zeitschrift für Staatsarzneikunde*, 1855, XXXV. p. 369. Such cases often occur—as, for instance, in Berne.

[While we write, the English newspapers furnish an illustration in point. At the execution of Joseph Myers and James Sargisson, which took place at Leeds, September 10, 1864, a horrible scene was enacted. Myers, after the commission of the murder for which he was executed, attempted to commit suicide by cutting his throat. "A short time previous to the execution," says a local paper, "attention was directed to the wound in Myers's throat, and one of the warders placed a small plaster upon it. Unfortunately this was not sufficient. A few days before the execution, Myers alluded to the state of his throat, and said that if the executioner did not give him 'another yard' of fall he should not die, for he could breathe through the wound. He showed to the person he addressed, that he could actually respire through the wound. The wound was in the middle of the throat, and the rope would necessarily come above it, so that there was imminent danger of a horrible scene unless the place was securely plastered over. The

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occur in every mode of execution, even that by the guillotine.[1] In these cases, indignation against the authorities is manifested; the people cannot understand how the Government should have the right of torturing the unfortunate man in such a horrible manner, and the prevailing feeling of compassion for the culprit extinguishes all respect for the law.

5. Not less painful is the impression produced by an execution, in which a culprit, in his despair, begins to struggle with the executioner, and thus renders the carrying out of the sentence difficult.[2]

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event showed, that proper means had not been taken to obviate this danger. The fall did not dislocate his neck, because of his weight, but it was sufficiently violent to tear open the wound, and a dreadful scene ensued. After one or two movements, Myers ceased apparently to struggle, and the attention of the executioner was directed to Sargisson, who struggled violently, and seemed to die very hard. But after a minute had elapsed, it was seen that Myers was still alive, and that breathing was going on through the wound in the throat below the rope! The dreadful occurrence caused an overpowering feeling of horror; but after a consultation with the surgeon, steps were taken which resulted in the eventful fulfilment of the sentence; but this was not accomplished until more than twenty minutes had expired after the drop fell! Whether sensibility remained in the body during the whole of that time, it is impossible for us to say. Certain, however, it is, that the culprit breathed for that time, and that the hoarse sound of the air rushing into the lungs was distinctly audible. Most fortunate it was that the screen in front of the drop completely concealed the bodies from the sight of the enormous crowd. We shudder to think of what the consequences might have been if the populace had seen what took place behind the screen."]

[1] It occurred, in Geneva, when Vary was executed, on May 26, 1861. The failure with the guillotine is brought about by the head of the culprit not fitting into the socket or being distorted by cramp, so that the hatchet does not strike fairly.

[2] The most painful execution of the kind took place in Châlons on May 10, 1851. [For a detailed description of the proceedings, see the paper, *Le Salut public, Journal de Lyon*, of May 12.] The unhappy

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6. Similar sad impressions have been produced, in consequence of the culprit, in his extreme anxiety, or perhaps, through bodily weakness, fainting, and the authorities coming to the determination not to delay the execution until he has rallied, but to have it carried into effect on the unconscious man.[1]

7. Grave objections to Death Punishment present themselves, in those cases in which criminals who fall sick, are cured at the public expense, merely that they may be executed.[2]

8. Besides, special attention is due to the case in

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man—Montcharmont by name—commenced, when being dragged to the guillotine, a desperate struggle with the executioner and his assistants, which lasted almost an hour, during which he wounded several persons and the executioner so severely, that he was incapacitated from performing his duty. An executioner had to be brought from Dijon, when at last, in the evening, the culprit having been rendered powerless, the sentence was carried into effect. A similar but less horrible scene is recorded by the physician Diez in his work on the *Verwaltung der Strafanstalten*, p. 89.—A woman guilty of poisoning, when being brought to the scaffold at Bruchsal, in her despair struggled and shouted in a most violent and heartrending manner, and could only by great force be brought to the guillotine. More horrible is the execution of a murderess that took place at Appenzell, December 3, 1849. She had to be dragged by several men from the prison to the market-place, and could not be executed till after a struggle, which lasted almost an hour and a half. Finally the head of the unhappy woman was fastened to a long pole by the tresses of her hair, and forcibly torn from the body, which was secured to the ground.

[1] From many cases of this kind we select that reported in No. 37 of *Le Droit*, of February 13, 1859—three soldiers on duty were so horrified at the sight, that they fainted.

[2] Cases of this kind occur when the criminal, while perpetrating his crime, is severely wounded, or after the commission of murder, attempts suicide, but does not succeed. A case of the first kind happened in London. For weighty objections against such an execution, see *La Belgique Judiciaire*, No. 88, 1861, which is copied from the French paper, *Le Temps*.

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which the criminal, up to the time of his execution, and under circumstances that corroborate his assertions, maintains his innocence. At any rate, the majority of the public in such cases take the part of the culprit.[1]

[1] The author happened to be at Geneva when Abo was executed. On the scaffold, in his last moments, when on the ladder, he asserted his innocence, and the clergyman declared in public, that he considered him innocent. The author afterwards heard of circumstances which rendered it probable that the sentence was based on an error.

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CHAPTER XI.

EXECUTIONS AND THE CONDEMNATION OF INNOCENT PERSONS.

THE effects of capital sentences carried into execution will in this chapter be considered under two heads :—

I. To what extent are the expectations of the legislator, in producing a wholesome effect for the prevention of crime, realized by inflicting the severest penalty ?

II. How far has experience shown that Capital Punishment has been inflicted on innocent persons ?

I. Experiences are, alas ! daily on the increase, proving that executions have not the alleged deterring effect. This appears from the following observations :—

1. That immediately after the execution of a murderer, in the same neighbourhood aggravated crimes of homicide have been committed.[1]

[1] On this point the report on Capital Punishments from Massachusetts, 1846, is important. After a long interval, a man was executed in Boston for arson ; since that time in Boston and its neighbourhood, cases of arson so increased, that the government caused an official inquiry to be made, from which it appeared that all the culprits witnessed the last execution.

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2. From the observations of prison chaplains, it appears that the greater number of those condemned for grave crimes had been present at executions.[1]

3. In England and France there are frequent instances of families, in which the grandfather, father, and brothers of a murderer, have been executed for heinous crimes,[2]—a fact which in itself affords proof of no deterring effect having been produced by the formidable example.

II. The experience, that the cases of condemnation and even execution of innocent persons are on the increase, is most important.[3] Even when executions are not carried into effect, and the person condemned to death is by mercy placed in the house of correction, the wrong is frequently irreparable.[4] But the

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[1] The Rev. Mr. Roberts of Bristol testifies that of 167 who were consoled by him before their execution, 161 declared that they had been present at executions. See further testimony in Mr. Phillips's *Vacation Thoughts* and in Berenger's work, p. 468.

[2] As shown in Laget Valdeson: *Théorie du Code pénal espagnol*, Paris, 1860, p. 152.

[3] Examples of this kind occur in all countries,—quoted in great numbers in Mr. PHILLIPS'S *Vacation Thoughts*, pp. 99–141; in the Report on Abolition, New York, 1857, p. 14. For examples of executions —or at least condemnations—of innocent persons in Italy, see *Eco dei Tribunali*, 1860, No. 1038. On a case in Ireland, see *Times*, January 19, 1857; and concerning other cases, *Dublin Review*, 1861, pp. 477-485. Statement of cases in France, see ORTOLAN: *Elémens du Droit Criminel*, p. 607, in *note*. Other cases in *Le Droit* of February 26, 1860, Nos. 50 and 59; *La Belgique Judiciaire*, 1855, p. 360. Recent cases in England, see *Times* of January 9 and 10, 1857.

[4] Most remarkable in recent times is the condemnation of two innocent persons in Hanover, 1854. One of them committed suicide in prison. An excellent statement of the case is given in v. GÖTTING: *Der neuen Pitaval*, XXVII., pp. 43 and 182.

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execution of innocent persons is an awful fact. The possibility afforded by law to the relations of proving the innocence, and of re-establishing the character of a person unjustly executed is—where the remedy of the law for proving the innocence of a condemned person exists at all—rendered extremely difficult, by the legal obstacles to a new trial.[1]

The frequency of cases in which innocent persons have been condemned, is caused:—

1. By judges and juries being misled through the testimony of false witnesses.[2]

2. By an otherwise honest witness being, through the excitement of the moment, led into error regarding the facts of the case, or the identity of the criminal.[3]

3. By the jurymen, in cases of circumstantial evidence being misled by the judge.

4. By competent experts giving an erroneous opinion.

5. By an error with regard to the imputability of the culprit, in cases in which this is a point of paramount importance. The condemnation of innocent persons occurs in the two last cases, and especially in the case

[1] We invite attention to the case of Joseph Lesurques, who was innocently executed, a fact which in France everybody recognizes, though the Chambers and the Government would not acknowledge it. On this case see PHILLIPS's *Vacation Thoughts*, p. 115.

[2] This was the case in the condemnation of two innocent persons referred to in a note (4) on previous page. It would be unjust to reproach jurymen with the result, seeing that the blame rests chiefly with the lawyers, who, like the public prosecutor, make it their business to secure a verdict of guilty.

[3] A very instructive instance of the way in which the innocence of a defendant was proved by the endeavours of a prison chaplain, is given in Clay's *Prison Chaplain*, p. 467.

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specified in the fourth head, when competent experts are mistaken. The immense progress lately made in natural sciences are frequently overlooked, and jurists who are ignorant of this progress often cause unjust sentences to be passed.[1] With regard to the fifth head, experience teaches that the not unfrequent occurrence of judicial murder,[2] in condemning such persons as are erroneously deemed imputable, is caused by the opinion given by physicians, deficient in knowledge, and accordingly unable to make correct observations, and ignorant of the results of recent psychological inquiries; besides, jurists from a similar ignorance are unable to conduct the judicial proceedings, and justly to appreciate the weight of the opinions of experts.[3] In this respect, the observations are of great importance, that especially in condemnations for murder, there is great difficulty in justly defining the nice boundary between an unsound mind and criminal intention.[4] Equally important are the experiences regarding the number of mental maladies, which are found to increase in proportion to the gravity of the accusations.[5] On this account, in all places of confinement, culprits are

[1] In recent times the case of Smethurst produced a great impression in England. It was alleged that the defendant was condemned to death on the ground of insufficient technical evidence. *Vide* on this case, *Gerichtssaal*, 1861, p. 346.

[2] A recent instance occurred in England, as shown by me in Friedreich's *Blätter für Anthropologie*, vii. bd., 2 heft.

[3] As shown in *Gerichtssaal*, 1861, p. 173.

[4] On this point the observation of a physician in the penitentiary of Philadelphia is important. See report of the inspectors of the State penitentiary of Pennsylvania, 1846, p. 57.

[5] See statements in Dr. Winslow's *Medical, Critical, and Psychological Journal*, 1861, October, p. 1; 1862, January, p. 1, &c.

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met with, who never would have been condemned, had their cases been conducted by competent persons.[1] Hence the proposal has been made, that on account of the untrustworthiness of opinions on responsibility, imprisonment should be substituted for Death Punishment, whenever a single expert gives it as his opinion that the accused person is not of sound mind.[2]

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[1] *Vide* statements in my *Der gegenwärtige Zustand der Gefängnissfrage*, p. 99, and the important observations of prison physicians in Dr. Winslow's *Journal of Psychological Medicine*, 1859, p. 65.

[2] LÖWENHARDT: *Kritische Beleuchtung der medicinisch psychischen Grundsätze*, Berlin, 1861, p. 105.

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CHAPTER XII.

THE REFORMATION OF PARDONED CRIMINALS.

It can easily be understood why, in times gone by, the general opinion, even in well-informed circles was, that the reformation of culprits cannot be reckoned upon, and why, whenever the question arose, whether a condemned criminal should be pardoned—his reformation being despaired of—the sentence of death was as a rule confirmed. Accordingly, the view prevailed, that the nature of the crime perpetrated, and the peculiar disposition which the criminal manifested during the inquiry, afforded the best criterion for deciding, whether or not the reformation of the criminal, during imprisonment, might be expected. Experience proves, that these views are erroneous. The attempts of recent times towards the improvement of prisons and penitentiaries, have, it is true,—very slowly, indeed—exercised an influence in changing previous opinions. The proofs at hand of the success arrived at, by good superintendents of prisons and sensible clergymen, wherever prison discipline supported their efforts—as, for instance, in cases of separate confinement[1]—were calculated to remove existing preju-

[1] Important in this respect are the statements given in Clay's *Prison Chaplain*, p. 316.

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dices. A right understanding of the spirit of Christianity teaches, that no criminal—so far as the possibility of his reformation is concerned—must be despaired of,[1] and that the gravity of the crime does not justify the inference that the culprit is incorrigible. There may remain a sound moral sentiment in the perpetrator of a heinous crime, which, when appealed to in the right manner, will lead to reformation.

For the purpose of this work, it is especially necessary to inquire, whether persons who are guilty of the gravest crimes — for instance, murder, and are kept in confinement—either because they are pardoned, or because Death Punishment has been abolished in the country, can be reformed in such a measure as to insure the State against the possibility of relapses into crime. We have now for a long series of years been engaged in collecting observations from prison functionaries.[2] From these it appears that even in the case of persons condemned for grave crimes accompanied with violence, reformation has been most frequently effected. The energy of will of such persons, so soon as a moral change has commenced, is manifested by proofs of sincere repentance, and by their persevering efforts to do good; whilst in cold natures impelled to crime by selfishness—as, for instance, thieves, or criminals prone to falsehood or hypocrisy—reformation can rarely be ex-

[1] The author had, in 1829, frequent conversations with M. Renaud, the overseer of the galleys (bagne) in Toulon, and learned that, according to his long experience, he considered no criminal incorrigible, if he was only treated in the proper way.

[2] The facts ascertained up to 1857 have been stated in the *Archiv des Criminalrechts*, 1857, p. 482.

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pected. It is important to observe, whether the crime of a prisoner stands isolated, often in a hitherto blameless life, whether his fall was caused by sudden unforeseen circumstances taking him, as it were, by assault; or whether, on the contrary, the crime sprang from a mind destitute of all moral principle, and depraved by an abandoned course of life.[1]

With respect to prisoners of the second description, reformation will be of rarer occurrence, and in their case the signs of improvement must be more carefully scrutinized, so as to guard against hypocrisy. The testimony, however, of all prison functionaries[2] of experience, confirms the opinion that no culprit can be considered as entirely incapable of reformation. Experience teaches that culprits will often for years resist all salutary influences, until at last[3] the combined efforts of the prison superintendent, clergyman and teacher, succeed in bringing them to an acknowledgment of their guilt, to a consciousness of the depth to which they had fallen, and to a determination to live a new life.[4]

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[1] The author has tried to classify the several culprits according to their reformability in Holtzendorf's *Strafrechtszeitung*, 1861, p. 1169. Important experiences regarding several classes of culprits are given in Clay's *Prison Chaplain*, pp. 316, 368, 393.

[2] *Vide* HOYER in Holtzendorf's *Strafrechtszeitung*, 1861, pp. 8, 265; DIEZ: *Ueber Verwaltung der Strafanstalten*, p. 69.

[3] Vide *Archiv des Criminalrechts*, p. 485, for the case of Francis H. in St. Gallen, and the robber and murderer in Oldenburg. Francis H. is still (1862) in prison, but gradually sinks into a disconsolate and melancholy state.

[4] In this respect we are taught by experience (see Clay's *Prison Chaplain*, p. 306) that those clergymen only can secure good and lasting effects who know, by a close study of the nature of the culprit, and by treatment regulated by this knowledge, how to convert him.

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Some of the greatest criminals spurn mercy[1] in whatever form it may be offered, but at the same time prove their reformation in prison, by deeds of repentance.[2] It is certain that separate confinement is most adapted for facilitating efforts at reform, because such confinement renders confidential conversations, and the study of the individual character of the culprit, possible. That, however, the reformation of great criminals is true and lasting, is best tested by their good behaviour after their dismissal from prison.[3]

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[1] So the robber and murderer in Oldenburg spurned mercy; and at the present time (1862) a decidedly reformed female infanticide (according to the testimony of Hoyer) declines pardon.

[2] The robber and murderer in Oldenburg became one of the most devoted of sick nurses. Also Karl Th. in St. Gallen. The murderer, Rudolph, in St. Gallen, supports his relatives, stints himself his rations of bread, in order that it may be given to the poor.

[3] Marianne B., who, with the assistance of her parents, killed her husband, was pardoned as a reformed character after seventeen years' imprisonment in the House of Correction (vide *Archiv des Criminalrechts*, p. 484). She is married again, and conducts herself in an exemplary manner.

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CHAPTER XIII.

PARDONS—THEIR BENEFICIAL RESULTS.

THE statements given in Chapter VIII., on the ratio between sentences passed and those executed, show, that the number of sentences followed by pardon are continually increasing; so that in most countries the sentences carried into effect constitute the minority. Whenever the question of the abolition of Death Punishment arises, the confidence is expressed, that in mercy a curative remedy is found providing for the commutation of those sentences which, though legally justified, ought not to be carried into effect. We hear in legislative assemblies responsible advisers of governments answering those who petition for milder punishments, that confidence must be reposed in the ruler, who, by clemency, will be sure to soften the harshness of law. Let the contention on the origin and history of the right of mercy be carried ever so far; let it be granted that this right originally was a privilege of the sheriffs and belonged to the administration of justice; it is now a settled fact, that it has actually become a privilege of the ruler,[1] (in monarchical states that of

[1] For derivation from Roman views, *vide* REIN: *Criminalrecht der Römer*, p. 264; LÜDER: *Das Souveränitätsrecht der Begnadigung*,

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the monarch,[1]) and cannot be dispensed with, however excellent the penal legislation may be. For the legislator cannot prospectively make provision for all possible contingencies—a general authorization for the judges to deviate from the letter of the law in special cases is attended with grave legal disadvantages, and the combination of extraordinary circumstances can so far diminish the guilt of the culprit, as to render the legally threatened penalty greatly disproportionate to the guilt. The infliction of the lawful punishment would, in such cases, violate the sense of Right in the public, and call forth indignation against the government. Besides, it is plain, that in these cases no remedy would be afforded by amending the imperfect enactment for future cases, since what is required is rather to prevent the execution of the unjust sentence, which offends the popular sense of Right, and clashes with the authority of justice.[2] But we must resolutely oppose the views often advocated, that mercy is antagonistic to the deterring influence,—a necessary ingredient in every punishment,—by neutralizing the effect which the punishment ought to produce on the people ;[3] on the other hand, we must also oppose the view generally entertained, which finds in mercy a remedy for defective legislation. In this view, as well as in the promise often held out in legis-

pp. 15-55; ABEGG in PÖZL: *Kritische Vierteljahrsschrift*, iii., p. 332. With regard to the development of Right in modern times, *vide* JOHN: *Das Strafrecht in Norddeutschland*, p. 344; OSENBRÜGGEN: *Ueber Strafrecht*, p. 179; HALSCHNER: *System des Preussischen Strafrechts*, p. 346.

[1] *Vide* MOHL: *Staatsrecht, Völkerrecht*, ii. p. 654; LÜDER, p. 55; ABEGG, l. c., p. 346.

[2] *Vide* MOHL, p. 639.

[3] Justly opposed to this view is ABEGG, l. c., p. 351.

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lative chambers that mercy in individual cases will supply general defects, there is certainly an impediment to the improvement of the law—many a weak representative being influenced by his confidence in mercy to vote for severe menaces, even against his conviction. No doubt the criminal enactments must be so worded, and the judge must have such instructions for cases of minor guilt (which it was the business of the legislator previously to define[1]), as to be at liberty to pass a sentence of a correspondingly lenient character; for the authority of judicial proceedings and the respect due to the bench would be diminished, if the judge had to rely upon mercy, and in individual cases to pass disproportionately severe sentences—while the people very properly expect that the judge should pass a just sentence, —and whilst a transposition of justice to the cabinet ought, on every account, to be avoided.[2] Hence the regulation requiring the courts to petition for mercy, whenever they find that the legal punishment is disproportionate to the guilt of the culprit, is another matter for serious consideration. Such a mode of proceeding is opposed to the very nature of judicial authority. Besides, a bad impression is produced on the people by the court pronouncing publicly, that it considers the sentence passed disproportionate and unjust.[3] We

[1] Those persons who are entrusted with the making of laws are, as a rule, too little acquainted with the many degrees of guilt in a crime, and are often too easily led astray by some cases of special gravity.

[2] How easily even very good jurists are misled by the error respecting the right of mercy has been shown in my paper in v. GROSS: *Zeitschrift*, ii. p. 310.

[3] *Vide* MITTERMAIER'S paper in FEUERBACH'S *Rechtsfällen*, Frankfurt, 1849, p. 10.

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are bound to prove that mercy is not the remedy, much lauded though it has been, for all the evils connected with Capital Punishment; and that, besides, the decision of a ruler, who has the privilege of granting pardon, depends on painful and difficult considerations.

I. Above all, the reflections which ought to guide the ruler in his difficult task, are a matter of serious import. A respected writer[1] asserts, that it is not proper for a ruler to decide by himself what punishment is due to a culprit before his trial, but that the sovereign may bring his individual view to bear on the case, so soon as the properly constituted legal authorities have decided what the penalty should be. We adopt this view, provided we are agreed on the precise meaning and limitation of the term "individual opinion."[2] In our view, the term must be so understood as to imply, that mercy is to be rendered subservient to justice by appealing to the *conscience*[3] of the ruler; so that he is not bound to account to any one for his reasons, but is supposed to be actuated by the serious intention of doing justice; in which endeavour he is guided, first by the consideration of special mitigating circumstances, of which, lawfully, the judges can take no

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[1] *Vide* MOHL, p. 637.

[2] The individual opinions of King Louis Philippe and King Oscar of Sweden were opposed to Death Punishment, but both of them waived their private views when their Ministers declared that the public interest required the maintenance of Death Punishment.

[3] *Vide* ABEGG in v. GROSS: *Zeitschrift*, iv., p. 310, and in PÖZL: *Kritische Vierteljahrsschrift*, iii. p. 352.

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cognizance;[1] and secondly, by due regard to the moral precedents of the culprit.[2] With regard to the last point, it is clear that the main consideration for the ruler must be, whether the culprit is thought to be incorrigible.[3] While the sovereign is seriously considering whether mercy is to be granted, and listening to the voice of his conscience, he must fully know the case—the result of the proceedings; the reasons for condemnation, and the moral characteristics of the criminal. In doubtful cases[4] pardon will be granted. The ruler can only arrive at the required knowledge by studying the various documents, and by the representations which emanate from his advisers, who are officially required to report on the case. According to the usual practice, the last-mentioned mode is commonly adopted. In these proceedings, the reports of the courts petitioning for mercy, the petitions of jurymen,[5] and the public generally, are taken into consideration. One easily understands how, in such a proceeding, a great deal depends on the one-sided view taken of the case by

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[1] This is a true fault in legislation; we accordingly disapprove of the Austrian legislation, which prohibits the judges from mitigating the penalty of death, however numerous the reasons may be, although they have the power of mitigating minor sentences.

[2] *Vide* HALSCHNER: *System des Preussischen Staatsrechts*, i., p. 543.

[3] It has already been stated that in the Austrian Court decree of 1803, the incorrigibility of the culprit was alleged as a reason for not granting mercy.

[4] We learn from the statements in the *Preussisches Justizministerialblatt*, 1848, p. 252, that in Prussia the granting of mercy was made especially dependent on the confessions made by the culprit.

[5] *Vide* MITTERMAIER'S four treatises (*Abhandlungen*), p. 9, compared with his work *Die Gesetzgebung*, p. 585.

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those who have to give their opinion, and on the view of the reporter, which, as a matter of course, is based more on humane than on strictly legal grounds. Experience teaches,[1] that not unfrequently in the courts themselves, which have to send in an opinion on the granting of mercy, great diversity of views prevails.

II. The supposition, that the culprit is incorrigible ought never to be a ground for refusing mercy. It has already been shown (Chapter XII.), that the greatest criminals when condemned to death, and afterwards pardoned, in the House of Correction gave such proofs of reformation as to deserve full pardon, and that this was even the case with criminals whose previous behaviour was so bad, as to lead competent persons to look upon their reformation as quite improbable. The ruler accordingly ought never to think reformation impossible. The enormity of the crime committed is no justification for supposing the culprit incorrigible, since even the greatest robbers and poisoners have been reformed. At the time when the granting of mercy is in question, no one is justified in expressing his opinion as to incorrigibility, because the behaviour of the culprit before, during, or after his trial, can furnish no decisive proof of incorrigibility for the future.

III. A perusal of the statements extant relating to

[1] An interesting statement regarding a report of the Altenburg Landesjustiz-collegium on granting mercy in a special case, *vide* in SCHLATTER'S *Jahrbücher*, XXXII., p. 72, from which it can be seen that the members, although agreed as to the undesirability of granting mercy, were, nevertheless, actuated by very different motives.

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the fate of petitions for mercy[1] teaches, that rulers are placed in a painful situation[2] by the application. Their final resolution depends more or less on many appeals by which they are assailed, either on the part of an excited public through the press and by means of petitions, or on the part of persons immediately surrounding them, who, if prepossessed in favour of the culprit in consequence of his personal address, his previous good behaviour, and his repentance, solicit for mercy, or otherwise act under the guidance of opposite feelings, on the supposition that the clemency hitherto shown has been productive of evil, and that a wholesome deterring example is required. Besides, the question whether a given case comes under the definition of murder or manslaughter,[3] frequently requires a very nice discrimination. The sentence cannot be mitigated if an error on the side of severity has been committed. When at the same time several cases are brought before the ruler for his consideration, he must compare them in order to come to a conclusion regarding the guilt of each. The comparison is one of great difficulty, and it not unfrequently happens, that the final decision is arrived at by considerations in themselves of an insignificant nature.

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[1] It is true these are not numerous. The most important are from Prussia in the *Justizministerialblatt*, 1848, p. 247.

[2] The Queen of England is freed from this unwelcome task, the authority being delegated to the Secretary of State for the Home Department. *Vide* also note (3), p. 166.

[3] Vide *Preussisches Ministerialblatt*, 1848, p. 253, from which we learn that the courts in several cases returned a verdict for murder where the Minister of Justice saw only manslaughter.

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IV. In certain cases the difficulty is increased by doubts, in the mind of the sovereign,[1] regarding the justice of the condemnation. The more tender his conscience, the more readily will he be influenced by the fact, that the culprit has either confessed or denied the crime of which he stands accused.[2] Still more delicate is the situation of the ruler, when the sentence rests entirely on circumstantial evidence, in which case doubts as to an error having possibly been committed take possession of his mind. A state of embarrassing doubt is also brought about, when a supposition or a probability arises from even supplementary evidence, that the accused *has been* wrongly deemed imputable,[3] or when the statements of the competent experts prove, that the sentence has been based on imperfect medical evidence.[4] In such cases the Sovereign may easily be prevailed upon, not only to *remit* the Capital Punishment, but in his letter granting pardon to say, that for reasons expressed, the culprit ought not to have been

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[1] *Vide* ARNOLD: *Ueber Umfang und Anwendung des Begnadigungsrechts*, Erlangen, 1860. He says (p. 10) that the Sovereign will grant mercy whenever he entertains the slightest doubt as to the justice of the verdict.

[2] We learn from the *Ministerialblatt*, p. 251, that in Prussia, with regard to the sentences passed in the Rhenish provinces, the circumstance of the criminal having made no confession was considered a motive for granting mercy.

[3] *Vide* a case in point in CASPER'S *Vierteljahrsschrift*, XX., No. 1. The experts disputed for eleven years respecting the imputability of a culprit, many of them deeming that there was only simulation.

[4] This occurred in the case of Smethurst. The Home Secretary's letter is remarkable. He had taken the opinion of a highly distinguished expert, whence it appeared that the technical evidence was insufficient. Vide *Gerichtssaal*, 1860, p. 348. [With regard to this case, we do not fully agree with the learned author.—ED.]

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condemned at all. It is plain, that proceedings of this description greatly jeopardize the established authority of the courts of justice.

V. In some cases mercy is refused, and the sentence confirmed, merely because the Sovereign is induced to act with increased severity by a transient disposition of the official furnishing the report, or his opinion, that pardons have for some time been too frequently granted; whilst, on the one hand, lawyers are not satisfied with the justice of the sentence, on the other, the people, taking a milder view of the case, demur to the condemnation.[1] In such cases exasperation arises against those who assisted in bringing about a refusal of mercy—a state of things by no means calculated to strengthen the hands of the Government.

VI. The position of the Sovereign, who has to decide on the confirmation of a capital sentence, has become still more painful since the introduction of trial by jury. Before the introduction of public trials in Germany, complete written records were kept, and from them the judges learned the facts—in these records they specified the reasons for their decision—while the established legal theory of evidence afforded a standard for testing the justice of their sentence.

[1] In a certain German capital a woman was executed. She lived with a second husband, who hated and disgracefully ill-treated a child by her former husband. The woman was suffering from consumption, and felt that she had not long to live. She was convinced that, after her death, the poor child would be abandoned to the cruelty of her husband, and accordingly resolved to murder it. She threw it into a well, and immediately afterwards reported herself to the local court. Pardon was refused. The author of this work was himself an eye-witness of the evil impression produced by this execution.

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All these materials, on which the opinion of the Sovereign and his advisers were based, are now no longer in existence. What proofs, statements, incidents are now forthcoming in the *vivâ voce* mode of proceeding, to what extent the demeanour of the accused and of the witnesses influence the decision, on which elements, the judge and jurymen—responsible to their conscience only—base their verdict, does not appear;[1] the meagre minutes do not explain it; the record kept of the preliminary inquiry is insufficient. Accordingly, both the Sovereign and his advisers must, for all the details of the case, depend upon insufficient evidence—especially the reports of the public prosecutor and the presiding judge, who even with the best intentions may easily be prejudiced, and thereby apt to mislead the Sovereign.

VII. Besides, the *vivâ voce* mode of proceeding tends to involve the Sovereign in other difficulties. The people present at the proceedings learn all the particulars of the evidence, and are enabled to form an opinion of their own on the verdict. This opinion will unavoidably often differ from that of the court. A grant, or a denial of mercy will afterwards be tested by the standard which they have formed for themselves. The case of an execution[2] will be compared with other

[1] In England, where the presiding judge is not required to question witnesses and the culprit, and accordingly can look upon the proceedings with full impartiality, he takes down in writing in a most exact manner all statements, and these notes are forwarded to the Secretary of State.

[2] A case in Belgium, which gave rise to an exciting debate in the press and in the country, is the following:—A certain man, called Rémory, who had, through avarice, murdered his mother, was pardoned in 1847. Another man, Themsche, who had in a disgraceful

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cases in which mercy was granted. Whatever can be said in favour of the poor executed culprit, or against the more fortunate offender, is turned to account. Where only the slightest probability exists that the social position of a pardoned criminal, or his connection with influential persons, has had anything to do with the mercy shown to him, the people will indulge in remarks derogatory to the Government, and suspicions, however unfounded, will be freely expressed.[1] A pardon which would have been fully justified, can easily be prevented, when the Sovereign is advised, that the granting of mercy in this case would cause the people to designate a previous execution as judicial murder.[2]

VIII. A delicate question arises, when several capital sentences passed by different courts have, at the same time, to be confirmed by the Sovereign. His feelings, being opposed to wholesale execution, will induce him to make a selection, which may easily be objected to by the public as arbitrary.[3]

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manner murdered his wife, was also pardoned. Soon after a mechanic, Van de Weghe, coming from the public-house where he had been drinking a great deal, met a man, who by his vile denunciation had brought about a judicial condemnation, killed him in the quarrel. Van de Weghe was executed.

[1] The author, who at that time was in Belgium, himself witnessed how the people were disposed, especially with regard to the Minister of Justice.

[2] We know that Lord Mansfield spoke in this manner to George III., who was about to pardon a man sentenced to death. *Vide* LIEBER: *On Civil Liberty*, p. 443, *foot-note.*

[3] In one case four different sentences were laid before the king. One of the culprits—viz., the one who had confessed, without whose confession the intent constituting murder could not be proved—was executed. The general opinion was that of surprise, that just the one

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IX. In Republican States, the pardoning of condemned culprits leads to peculiar difficulties. We shall divide them into two heads :—

1. When, according to the constitution of a country, a great political assembly has to decide on the petition for mercy—as, for instance, in Switzerland, the Great Council.

2. When, constitutionally, the President of the Republic alone has the power to grant or refuse mercy, as in America, the Governor of a single State.

1. In States of the former description, the question whether mercy shall be granted is the subject of *public* discussion.[1] Thus, on the one hand, the people become acquainted with the reasons on which mercy is granted or refused—a circumstance which inspires public confidence ; but, on the other hand, the proceeding is attended with drawbacks. The decision must be arrived at by a majority. When the denial of mercy is given by a small majority, a single vote often deciding the question, the result is not likely to be received with much favour. And this is so much the less the case, when the comparison of the votes for and against pardon shows, that among the minority were the most intelligent, and especially the most popular men, while the majority included those less distinguished and less esteemed. From the discussions it is often seen, that the reasons on which mercy was denied were various,

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who had confessed, thereby proving repentance and a better nature, was executed, while the others, who were pardoned, seemed to be much more depraved.

[1] The author has communicated a report of a debate which occurred in Geneva in the *Archiv des Criminalrechts*, 1857, p. 19.

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and some of them very weak; so that the people are often inclined to disapprove of the resolution come to.

2. With regard to the second system, the practice of America has led to no good results.[1] We learn, that here the right of granting mercy is abused in a manner very prejudicial to justice. Everything depends on the arbitrary will of the Governor, who, in consequence of the prevalence of party spirit in America, is often assailed by the partisans of a culprit, in a manner endangering his impartiality. He often has occasion to favour a certain party, and is frequently besieged by a storm of petitions artificially raised.[2] [3]

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[1] Shown by LIEBER: *On Civil Liberty.* Philadelphia, 1859., p. 436.

[2] On the numbers of pardons granted, *vide* Lieber, p. 381.

[3] (Referred to on page 160). *Vide* Mr. Harry Palmer's Observations on the Royal Prerogative of Mercy, in a Paper, read before the Law Amendment Society in 1863, on "The Law of Appeal in Criminal Cases."—(*Transactions of the Law Amendment Society*, 1863-4.)

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CHAPTER XIV.

ARGUMENTS IN FAVOUR OF CAPITAL PUNISHMENT.

THE critical examination of the important question regarding the maintenance of Death Punishment would be incomplete, without paying due attention to the fact, that up to the present time many highly respectable statesmen, profound jurists, and scholars have expressed it as their opinion that the penalty, provisionally at least, ought to be maintained. A comparison of the various statements leads, it is true, to the conviction, that the belief in the necessity of retaining the extreme penalty is often based on empty phrases, the natural offspring of a hazy idea of justice—and on the predilection for whatever has existed for a long series of years. Persons so disposed eagerly look out for any argument, whereby time-honoured institutions may be shown in a favourable light. Besides, they are unconsciously influenced by an attachment to the deterring principle. We shall endeavour faithfully to lay before our readers all the leading arguments, which in modern times have been put forth by the advocates of Capital Punishment.

I. It is argued that justice requires that the amount of the evil inflicted by a penalty ought to be in harmony

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with the gravity of the crime committed; and consistently, according to the tradition of all nations, for the gravest crime—murder, the severest penalty—death—is inflicted.[1]

II. The consciousness of Right, in the public at large, requires the infliction of Death Punishment. The feeling of justice, innate in every human being, would be violated if the penalty were not proportionate to the offence, and if everybody were not recompensed according to his deeds. This accounts for the fact, that the mercy granted to a great criminal shocks the sense of Right in the people. Hence, in Germany, many voices were raised, and even petitions sent to the Chambers, against the abolition of Capital Punishment, when it was enacted by the fundamental rights of 1849.[2] An appeal is made to experience, that if the feeling of justice in the people is not satisfied, they will have recourse to a summary process of expiation, and inflict that punishment on the criminal which in their opinion the State ought to have inflicted.[3]

III. It is asserted, that the main object of punishment is the expiation of the crime committed, and that the only proper expiation for murder is death. These advocates of the extreme penalty assert, that during an execution the people are penetrated with the feeling

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[1] These reasons are assigned by ROTTECK, and, recently, especially by TISSOT: *Droit Pénal*, note i., p. 342.

[2] These were the reasons given by the Government of Würtemberg.

[3] The application of the Lynch law in America is often referred to, which, however blameable in itself, must still be noticed as an expression of the popular will.

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that justice has been satisfied; they allege that it frequently happens, that the criminal condemned to death with wonderful tranquillity states, that he willingly submits to the penalty, from a conviction that it is an expiation of his guilt and the means of arriving at reconciliation with himself, with God, and with mankind.[1]

IV. It is attempted to justify Capital Punishment by the assertion, that its abolition would remove one of the best safeguards of society. Many a dangerous criminal, who has no respect for the life of his fellow-man, has, by the infliction of this penalty, been prevented from doing further mischief. No other mode of punishment is so likely to set mankind at rest, with regard to the danger to be apprehended. In short, it is alleged, that the infliction of Death Punishment is the means of saving many lives.[2]

V. Deterring from crime is maintained as one of the objects aimed at in the penalty, even if no longer considered as the chief or only object. No other penalty can (in the opinion of its advocates), in this respect, be compared with Death Punishment. It is asserted, that if Death Punishment be not an universal preventive, it is at least effective in many cases. The alleged increase of capital crimes, after the legal abolition of Death Punishment—as, for instance, 1849, in Germany, through the enactment of the fundamental rights—is

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[1] Vide *Archiv des Criminalrechts*, 1854, p. 529, where KRUG by reasons of this kind defends Death Punishment.

[2] This is the opinion of HEPP: *Ueber die Zulässigkeit der Todesstrafe*, p. 32.

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adduced as a leading argument for the necessity of maintaining the extreme penalty.

VI. The adversaries of Capital Punishment are reproached, with the intention of ultimately abolishing the whole Criminal Code; because the reasons given for the abolition of Death Punishment, it is affirmed, hold equally good for the abolition of all punishment.[1]

VII. The abolition of Capital Punishment would have the disadvantage, that crimes widely differing in their nature would be placed on the same footing; those penalties which would have to be substituted for Death Punishment being now employed for minor offences—for instance, robbery and arson. Besides, a person criminally disposed if he knew that he would only be punished with imprisonment for life, would, instead of merely perpetrating robbery, commit murder at the same time, being aware that no higher penalty on that account would be inflicted.[2] Further, a murderer in prison, when condemned for life, would sooner be induced to commit a fresh murder, if aware that even for this additional crime no Death Punishment would be inflicted.

VIII. If the right of the State to inflict Capital Punishment be disputed, the defenders of the penalty argue, that the State has undoubtedly the right to ask from its citizens every sacrifice required for the safety of

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[1] *Vide* KRUG: *Ideen zu einer gemeinsamen Strafgesetzgebung*, Erlangen, 1857, p. 21.

[2] This reason was given by the Secretary of State in the Italian Parliament.

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society. The State requires its citizens to sacrifice their lives for the defence of the country; consequently, no one can dispute its right to inflict Death Punishment, without which its ends cannot be attained.[1]

IX. A leading argument against abolition in a single State, is found in the danger dreaded from such a one-sided abolition, that great criminals from neighbouring States in which Death Punishment legally exists, would flock into the State which has abolished it, in order there to commit the crimes which they could not so perpetrate in their own country without endangering their lives.[2]

X. It is asserted that in the German fundamental rights, exception was made regarding a state of war. Hence the inference, that Death Punishment is justifiable under extraordinary circumstances.

XI. Many writers (*vide* Chapter V., foot-note (1), p. 80) maintain, that the statements in the Bible, which command Capital Punishment, have an obligatory power on all Christian legislators; accordingly, they consider the penalty justified, in menacing which the legislator obeys the commands of God.[3]

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[1] This argument is prominently put forward in the motives for the Portuguese Penal Code. *Vide* abstract in *Gerichtssaal*, 1860, p. 212.

[2] This reason was brought forward in Tuscany in order to induce the Grand Duke to reintroduce Capital Punishment. The same argument was insisted on in the Upper Chamber of Bavaria.

[3] The author remembers a conversation he had with the governor of the House of Correction in Edinburgh in 1850. This gentleman stated, as the result of his experience, that Death Punishment has no deterring effect. On being told in reply, that, consequently, the penalty ought to be abolished, he declared, however, that this could not be, on account of the explicit command in the Bible.

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CHAPTER XV.

THE ARGUMENTS IN FAVOUR OF CAPITAL PUNISHMENT EXAMINED.

In analyzing the arguments stated in the previous chapter, the inquirer is involuntarily reminded of the time when the struggle was carried on for the abolition of the rack, of bodily chastisement, and of aggravated Death Punishments. At that time also, the adversaries of abolition had a great deal to say of the dangers likely to threaten the safety of society if the State, in the administration of the law, were deprived of the means hitherto considered indispensable. Even the most humane rulers, who were induced by their own better judgment to give their consent to the abolition of those atrocities, considered it at the same time advisable not to make the abolishing decree public; they dreaded the dangers likely to befal society, if criminals were informed that the rack and other stringent remedies were no longer employed.[1] We remind our readers of the recent

[1] We call to mind the decree of the Emperor Joseph, referred to in Chapter II., p. 41, where it is stated that he did not consider it expedient to promulgate his resolution to stop the infliction of Death Punishment. When King Maximilian of Bavaria, yielding to Feuerbach's entreaties, abolished the rack, the decree was not allowed to be published in the official organ, and was only made known to the courts privately.

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fact, that when the abolition of bodily chastisement was enacted in Prussia and Baden, the Chambers, during the succeeding session, were petitioned to re-introduce the punishment. But the opinions of the better informed prevailed. The rack and bodily chastisement remained abolished, and the evil consequences so much dreaded never followed. Those reactionary attempts were severely censured by public opinion. Results of a similar kind will follow the abolition of Capital Punishment.

We shall now examine, one by one, the arguments enumerated in the last chapter.

I. As to the alleged requirements of justice and retribution, almost everything that is necessary as a refutation has been said before in Chapter V., in which the theory of right in relation to punishment is discussed. It has been already shown, that the so-called theory of justice, even by its advocates, is understood in different senses, and that the arguments on which it is based are fallacious. We agree with one of the defenders of Death Punishment, at least in one point. Vogt,[1] a man of a truly Christian mind, says that retaliation cannot be the object of Capital Punishment, because it is antagonistic to Christianity and is the offspring of uncivilized harshness, which, descending through the Mosaic system, crept into, and afterwards became amalgamated with Christianity. When aggravated Death Punishment disappeared from the codes, many a writer asserted, that the innovation would destroy the just ratio between offence and punishment, because it would then

[1] *Vide* his work, *Das Armenwesen*, vol. ii., p. 128.

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be impossible to inflict a greater punishment upon a greater criminal—a greater punishment, for instance, upon a parricide than upon a common murderer. Such are the unfortunate conclusions at which we arrive, when following the theory of retribution belonging to that barbarous age which gave birth to the system of the *lex talionis*. In taking that theory for granted, we forget that the defenders of retribution, by inflicting the same evil which the criminal has inflicted upon a fellow-man, do not understand the term sameness or identity, in a literal sense, and are by no means agreed among themselves as to the meaning of that term. Kant, for instance, refers that identity to the perception or feeling of the criminal; while Hegel postulates that the value of the evil inflicted by the punishment must be equal to that which the culprit has brought upon a fellow-man. It can easily be shown, that in taking the advocates of retribution as guides, we should be led to base penal law on mere caprice.[1] When the defenders of retribution—especially for murder—insist upon Death Punishment, they are certainly wanting in due logical discrimination; for, in order to render the penalty proportionate to the guilt, murder with intent, manslaughter, death arising from bodily injury with intent, homicide committed in wanton carelessness, ought to be distinguished, because the degree of guilt is different in these different offences. Accordingly, it would have been incumbent on the defenders of Death Punishment to define in which of these cases the penalty is an equivalent of the guilt, and therefore a consequence

[1] *Vide* BERNER: *Abschaffung der Todesstrafe*, p. 8.

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duly derived from their alleged principle of retributive justice. It is evident, that here everything is entirely based on arbitrary assumption. According to this theory, mercy granted to a murderer would be indefensible, because it would violate the requirements of absolute justice.

II. The argument purporting to justify Capital Punishment by the consciousness of Right in the people, rests, like the preceding, on an erroneous assumption, in which the artificially construed theory of retaliation is attributed to the people. We might fairly ask those who appeal to the consciousness of Right in the people, on what evidence they base their assertion. They form a very low estimate of the people when they speak of the zest with which the rude, indifferent spectators are alleged to express their approval of the appalling spectacle. They seem entirely to forget, that the day when an execution takes place is one of intense pain for persons of humane feelings and benevolent intentions; whereas the behaviour of the people of Tuscany—referred to in the foot-note (page 72) of Chapter IV. —is the real expression of moral feeling in the people. A legislator who accepts the outbursts of an uneducated vulgar crowd as the expressions of the popular voice, commits a grievous error.[1] The advocates of the penalty forget that, though Death Punishment has been abolished for several years in many German States, no disapproval has been expressed on the part of sensible men, and that to the present day, in Oldenburg and Nassau, where, since 1849, Capital Punishment has not been employed,

[1] *Vide* BERNER: *Abschaffung der Todesstrafe*, p. 10.

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according to trustworthy official statements no one has desired its re-enactment. Instead of energetically opposing the outbursts of an uneducated populace, of enlightening the people as to the true object of punishment; instead of receiving the evidence of men of experience, and, in this particular, following the example of England; instead of listening exclusively to public functionaries—some of our legislative assemblies thought it more expedient, by a new legal enactment, to re-introduce the infliction of the extreme penalty. We are often involuntarily induced to believe, that those lawgivers are paving the way for the re-introduction of ancient vengeance for blood. In how far the absence of publicity can render executions less objectionable, will be discussed in a subsequent chapter.

III. The third argument in favour of the maintenance of Death Punishment, is based on expiation. Properly speaking, this argument has already been refuted in Chapter V., but we shall here add a few words. If the meaning be that civil society will be reconciled to the culprit, and that the people recognize in this penalty the just expiation of a great crime—of murder, for example,—then the whole reasoning is based upon a disguised theory of obsolete retaliation, by which the feeling of revenge is raised to the dignity of a principle of Penal Legislation. We are accordingly surprised to hear men of excellent intentions speak of the expiation made by a public execution, while they entirely leave out of view the fact, that the infliction of the extreme penalty renders moral reformation impossible. Will they obstinately refuse to recognize the fact, that the true reconciliation

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of society is best effected by morally reforming the criminal by an improved system of prison discipline? If it can be shown, as has been done in a former chapter, that even the greatest criminals can be thoroughly reformed, the argument based on the expiatory theory of Capital Punishment is refuted. But those who found their argument on the alleged fact, that a criminal condemned to death frequently looks upon his execution as the means of expiation, and as a satisfaction to his conscience, must certainly have never either personally watched criminals during their last hours, or paid due attention to the statements of experienced prison chaplains. If they had done so, they would have known that, in by far the greater number of condemned culprits, so soon as they are convinced that their execution is certain and unavoidable, a state of mind ensues which borders on insanity. With his reason clouded, and his feelings benumbed by despair, he seizes with avidity every comfort held out by the clergyman. The culprit is told that his death is an expiation, and may believe it, so far as in his weak state of mind he is capable of forming a distinct idea on the subject.[1] Are these defenders of the theory of expiation quite satisfied with their notion of voluntary submission, by which the criminal obtains internal peace, when they witness the execution of a culprit, who, far from giving

[1] The term expiation (*Sühne*) is not contained in the vocabulary of the people either in the north or in the south of Germany. By a close investigation of the matter people might learn that the term *Sühne* has been imparted and instilled into the mind of the criminal by the clergyman who endeavoured to comfort and tranquillize him during his last hours.

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signs of repentance, swears dreadfully, and fights a pitched battle with the executioner? Those who thus talk of expiation, ought at least to acknowledge, that the best expiation would be the moral reformation of the criminal.

IV. and V.—The arguments stated under the heads IV. and V., are based on the merely arbitrary assumption, that no other punishment but death—not even imprisonment for life—can insure the safety of society. We are here compelled to return to the question already discussed, whether the mere menace of Death Punishment *per se*, has the power of preventing persons criminally disposed from the commission of crime. We are far from committing ourselves to the one-sided assertion, that no persons criminally inclined are prevented from the perpetration by the prospect of the formidable penalty of death. But it has been shown in Chapter V. that, as a rule, the legal menace has no deterring effect. If an appeal is made to the alleged assertions of many criminals, that they would not have committed the crime had they known it was punishable with death, it is forgotten that such a statement is very frequently the result of a cunning device on the part of the culprit in order to induce the Sovereign to grant mercy.[1] However this may be, the experience is decisive, that in those countries in which Death Punishment has been abolished, no increase in capital crimes has taken place.

[1] The author remembers an instance, in which a cunning culprit repeated the statement he had made during his examination when the question of mercy was mooted. This manœuvre had the desired effect.

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Besides, granting that perhaps a few men have by Capital Punishment been prevented from the commission of crimes, this is no justification for retaining the penalty, when it is shown to be attended with greater disadvantages. Further, experience furnishes irrefutable proofs of the reformability of even the greatest criminals.

VI. Those who raise the objection to the advocates of abolition, that their arguments hold good for the abolition of all punishment, forget the peculiarities which distinguish this penalty from every other. Death Punishment renders the reformation of the criminal impossible, and the injustice committed by an error of the judges irreparable.[1]

VII. The advocates of the extreme penalty assert, that by substituting imprisonment for life for Death Punishment, crimes totally different would be placed on the same footing; but this could easily be remedied by threatening absolutely with imprisonment for life those crimes which hitherto were punished by death, while for other crimes perpetual imprisonment would only be menaced as a maximum penalty, which the judge might be authorized to inflict in those cases where the guilt is deemed equivalent to murder.[2] The

[1] An advocate of Capital Punishment pleaded the other day, that a person innocently condemned to imprisonment could not either be indemnified for the loss of health he may have sustained in gaol; but this objection only holds good in the case of prisons badly managed, and might easily be remedied.

[2] If it be asserted, that many a man who commits a robbery would sooner be induced to commit murder when aware that no graver penalty than imprisonment for life would be inflicted upon him, were Death Punishment abolished, it is evident that such an opinion is based

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apprehension—that the condemned murderer, when aware that by a fresh murder he would run no risk of being executed, and would thereby be induced to perpetrate the crime in prison—vanishes when closely examined.[1]

VIII. The plea, that the State, which requires the citizens to sacrifice their lives in war in defence of their country, is equally entitled to demand the sacrifice of life in the interest of justice, is unfounded—because the two cases are so dissimilar as scarcely to admit of a comparison. A justifiable war is waged for objects, in the attainment of which every member of the State has an interest. War imperils the very existence of the State, and consequently renders it incumbent on every one of its citizens to exert himself to the utmost, even

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on the unfounded hypothesis that the criminal in these circumstances in cold blood weighs the reasons for and against—a supposition directly opposed to experience. It is further maintained, that after the abolition of Death Punishment a criminal condemned to imprisonment for life might, should he escape from prison, easily be induced to commit murder, being aware that, at the utmost, imprisonment for life would be the penalty. This apprehension is removed, when prisons are so constructed as to render escape impossible. On the other hand, if the murder is committed by a pardoned culprit, he would in that case suffer the punishment to which he would have been subject if in the first instance he had been guilty of murder.

[1] This argument has been specially adduced in America for the necessity of Death Punishment when, for instance, in the House of Correction at Boston, the superintendent, and, in another case, a warder, were murdered by a prisoner. But it has justly been remarked, that when such cases happened, they were caused by mental derangement. For a remarkable investigation, see the report of the trial of Abner Rogers, Boston, 1844. Rogers had murdered the warder, but was acquitted on the ground of insanity. The fault was either that the physician did not understand the case, or that the deed was the consequence of harsh and exasperating treatment of the culprit, or the result of a bad system,—viz., employing culprits as spies.

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at the risk of his life, in order to rescue the State. Criminals by no means imperil the existence of the State. The risk of such a conspiracy, as would endanger the State, is diminished in proportion as civilization advances, and the just claims of the various classes of society are satisfied. At the same time the improvements in the construction and management of prisons, afford increased security against these greatly exaggerated dangers.

IX. The plea, that criminals from neighbouring States would flock to that State which has abolished Capital Punishment, is even more futile than the preceding argument. There has been no such result in Tuscany, in Oldenburg, or in Nassau. No inhabitant of Prussia, who had the intention of murdering his wife, would think of enticing her to Oldenburg, in order to kill her there, where his own life would be safe.

XI. The time has certainly arrived, when the argument adduced under this head may be finally discarded. Appeals to passages of the Old Testament can no longer be of any avail as a justification of a legislative act. The time of such authority is passed. The legislator who takes the Mosaic law[1] for his guide, must consistently also punish with death those who work on the Sabbath.[2] Those who quote passages of Scripture

[1] Turner, in the memoirs of the Manchester Literary Society, vol. ii., p. 309, has shown the worthlessness of the appeal to Mosaic law as a guide for modern legislation.

[2] Such a command will be found in Exodus xxi., 28; but it has been shown by learned commentators that the well-known passage of the Bible regarding the shedding of blood, implies no command of Death Punishment.

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enjoining, by express command of God, that a trespasser must be punished with death, ought not to forget, that Moses expressed his enactments in the manner common to legislators in ancient times, who for their own laws claimed the sanction of the Divine will; no one, on that account, is justified in taking the historical part of the Old Testament as a command of the Deity.[1] Those who appeal to the New Testament forget, that wherever the sword is mentioned, the right of the State to inflict punishment is only metaphorically alluded to.[2] It is a matter of great regret, that no attention is paid to the decided contradiction existing between Death Punishment and the sentence Christ pronounced respecting the adultress,[3] nor to the fact that the Christian Church, ever since its first establishment, clinging to the idea of moral reform, opposed the infliction of the extreme penalty.[4] It is a significant fact that some of the most distinguished divines reject Death Punishment,[5] and that in the Legislative Chamber of Würtemberg it has been opposed, both by Protestant and Roman Catholic clergymen.[6]

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[1] *Vide* PHILLIPS: *Vacation Thoughts*, pp. 47–53; Dr. WINSLOW, in the *Journal of Psychological Medicine*, 1856, p. lxxxi.; ALBINI: *Della Pena di Morte*, p. 39; SCHLATTER: *Unrecht der Todesstrafe*, p. 12.

[2] *Vide* TRUMMER: *Das Verhältniss der Strafgesetzgebung zum Christenthum*, p. 17.

[3] SCHLATTER, p. 74.

[4] As shown on pp. 5 and 6 of this work.

[5] For instance, SCHLEIERMACHER: *Sermons*, vol. iii., p. 512; ARNOLD (new edition, by Lämert Diakon), p. 311.

[6] *Vide* BERNER: *Abschaffung der Todesstrafe*, p. 6; PHILLIPS: *Vacation Thoughts*, p. 61. In 1824 a remarkable discussion took place in Otahaiti, where Death Punishment was abolished, after it had been warmly supported on the ground that it was commanded in the Bible.

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We conclude this chapter with our objections to the argument No. X., not yet disposed of.

X. Those who appeal to the fact that the infliction of Death Punishment was exceptionally admitted in the fundamental rights of Germany, as a penalty for the army and navy, must be reminded that the members of the National Assembly in Frankfurt were not agreed as to the definition and extent of military law. The majority thought it only applicable to times of war, and here, it must be admitted, contingencies may occur to justify the infliction of Capital Punishment. The deserter from the battle-field, the traitor and the spy, may be punished with death, more especially as in these cases imprisonment would be impracticable.[1] Besides, the killing of persons offering armed resistance may be justified when, on account of riots, martial law has been proclaimed. But it by no means follows, that sentence of death may be passed on prisoners, after the riots have been suppressed.[2]

[1] Hence the Military Penal Code of Oldenburg of September 7, 1861, threatens soldiers with Death Punishment (arts. 45, 49, and 58), although the penalty is abolished in Oldenburg.

[2] *Vide* MITTERMAIER's paper in the *Archiv des Criminalrechts*, 1849, p. 67.

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CHAPTER XVI.

ARGUMENTS FOR THE ABOLITION OF CAPITAL PUNISHMENT.

WHOEVER impartially inquires into the subject must be struck with the observation, that fifty years ago a great number of crimes were threatened with death, regarding which now-a-days no legislator could make up his mind to menace the extreme penalty. In consequence of this legal threat, thousands were slaughtered on the scaffold, while now we are ashamed that such a barbarity ever obtained the sanction of the law. The question may fairly be asked, whether such a fact ought not to raise suspicions against the penalty in general, and to make it incumbent upon us, conscientiously to inquire into the necessity of maintaining it.[1] This serious question is more and more being forced upon our attention, by daily occurrences. The advocates of abolition are not merely theoretical writers who take a one-sided view of the world—not merely men who, in their antipathies to everything existing, are desirous of shaking the foundations of civil order, or of seeing Death Punishment abolished that it may no longer be inflicted upon them-

[1] *Vide* AMBROSOLI: *Sul Codice Penale Italiano*, p. 31.

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selves and their partisans; but we find among them distinguished men of a practical turn of mind, who have long been engaged in humane and generous endeavours —as, for instance, in England—in the improvement of the Penal Code and the management of prisons—step forward and raise their voices for the abolition of Death Punishment. We find that, in recent times, in Bavaria, two of the most worthy and experienced men,[1]—and in Prussia, a man of high rank, distinguished both by his official position and his learning,[2]—have expressed their views against the penalty. Of great significance is the declaration of the Lord Chancellor of Ireland at the Congress of the Association for the Promotion of Social Science, that the sacredness of human life is getting more and more appreciated, and that the unnecessary maintenance of Death Punishment is becoming a crime on the part of the legislators themselves.[3] History teaches that in ancient times the menace of Death Punishment was considered to be justified by three ideas,[4] viz. :—

1. *Lex talionis.*

2. Belief in the necessity of criminal law as a deterrent.

3. The notion of making atonement to an offended Deity.

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[1] Count REIGERSBERG, the last president of the Reichskammergericht and for many years Minister of Justice in Bavaria, and ARNOLD, who for many years was president of the Court of Appeal.

[2] Herr BORNEMANN, president of the Oler Tribunal, a jurist of profonnd learning and practical experience, in the *Justizministerialblatt*, 1848, p. 253.

[3] Vide *Transactions*, 1858, p. 49.

[4] *Vide* Chapter I. of this work.

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The Germanic nations have inherited these ideas from the ancients; but as soon as a nation attained that degree of culture on which the legislator learns to appreciate the moral nature of man, these ancient views regarding Capital Punishment gradually disappeared. It was at this stage, that Christianity manifested its influence by propagating the sublime idea of a loving God, who does not desire to see the death of the sinner, and sets before the legislator the task of reforming the criminal. All inquiries on the subject lead to the conviction (Chapter V.), that none of those theories, by which learned jurists endeavoured to justify Death Punishment, are sufficient for attaining this purpose. An inquiry into the various arguments, by which the members of legislative assemblies have attempted to justify the preservation of Death Punishment, has shown how weak the alleged reasons are, and that the defenders of the penalty in their despair were compelled to have recourse to the right of necessity (*Nothrecht*). Hence it appears, how weak the foundations are on which the penalty is based.

How repugnant Death Punishment is to the feelings of men in our time appears from the fact that legislators every year more closely restrict the number of capital crimes, while the number of pardons granted to convicted culprits increases in the same proportion. We have no occasion for concealing the fact, that many of the arguments adduced by writers in support of abolition are indefensible, and have been justly attacked. This is especially the case with the reasons derived from the view, that men, when combining to form a State, had either no right, or no intention of trans-

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ferring to that State, the rights on their own lives. Such reasoning is the offspring of the erroneous idea, that political States were preceded by a state of nature, and formed by contract. Besides, some other reasons, suggested by the perception of single injuries that are connected with the penalty, are equally untenable, and by no means sufficient to prove its unlawfulness.[1]

In order fully to examine the reasons for abolishing Capital Punishment, we are bound to consider the penalty with regard to :—

A.—Its Lawfulness ;
B.—Its Expediency.

While, for the sake of clearness, we divide our subject into these two heads, we must remark that, properly speaking, a penalty cannot be lawful if it be not indispensable for attaining reasonable objects—that is to say, expedient.

A.— Regarding the Lawfulness, we propose to examine—

Whether Death Punishment can be justified by reasons derived from the nature of the right of the State to inflict punishments, and from the ends aimed at by the exercise of that right ;

Whether this penalty has the qualities indispensable to all penalties.

We begin with establishing the principle, (1,) that

[1] These erroneous views are refuted by ALBINI: *Della Pena di Morte*, p. 18; BOERESCO, p. 348; ORTOLAN: *Elémens*, p. 605; Mr. W. M. BEST, in the *Papers of the Juridical Society*, p. 401; GABELLI, in the *Monitore dei Tribunali*, 1861, p. 227.

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no authority is justified in inflicting punishments which overstep the boundaries of human jurisdiction. Life is the gift of God, of which no man has a right to deprive his fellow. No man is entitled to inflict a penalty, by which another man is prevented from morally reforming himself, and from manifesting the fruits of sincere repentance. Man has only the authority to deprive his neighbour of his civil rights; he has no claim to interfere with the rights which belong to him in his capacity as a human being. Those who contend that the political State *protects* the rights of its citizens, must be reminded, that on this plea the State can only exercise the right of giving warning of the withdrawal of its protection from those who, by the commission of a crime, have rebelled against civil order; no inference justifies the legislator in killing the *man*.[1] He might perhaps withdraw the right of citizenship, as was done in ancient times, or declare the criminal to be peaceless (*friedelos*), as was done in the Germanic law, to deprive the criminal by this very act of the protection of the State; but the withdrawal of this protection by no means justifies Death Punishment. How much the penalty is opposed to the true object of all punishment, is best seen in those cases in which the criminal gives unambiguous proofs of his repentance and reformation, not only during the last hours of despair, but immediately after the commission of the crime. It not unfrequently happens, that the commission of the crime is just the turning-point, from which the moral

[1] This is well shown by POLETTI: *Diritto di Punire e la Tutela Penale*, p. 336.

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transformation of the criminal begins; because he learns by his own deed, whither an evil habit in which he hitherto indulged must inevitably lead him.[1]

Another bad effect is manifest, when the sentence of death is passed on youthful criminals who have attained (or exceeded) the legal age of responsibility. If the minor had made a business agreement, he would have had the legal benefit of *restitutio in integrum;* but when convicted of a crime, he is returned to the Almighty, like a dishonoured bill of exchange.[2]

2. Another argument, to prove the unlawfulness of Death Punishment, is its opposition to the spirit of Christianity.[3] It might be a difficult task for the defenders of the penalty in those States which make a boast of their Christianity, to bring Death Punishment into harmony with the generous endeavours of the Fathers (Chap. I.), with the sentences pronounced by Christ Himself, and with the principle so often and so forcibly inculcated by the Church,—that God does

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[1] We know of a case in which a wife, often irritated by the assaults of a drunken husband, frequently gave way to fits of violent passion; and, after a gross insult on his part, yielded to the instinct of revenge, and killed him. Immediately after the perpetration of the crime she repented. Besides, during the time she was in prison—a period of almost two years—a complete moral reformation was wrought in her, by the teaching of an excellent clergyman. Nevertheless this woman was sentenced to death, and executed, after the lapse of two years.

[2] According to the law of certain countries which—for instance, in France and Prussia—fixes responsibility at the age of sixteen, a young man, one or two days older, may be sentenced to death. In Bavaria, there were, from 1851 to 1853-4, five persons under twenty years of age sentenced to death, and three of them executed.

[3] *Vide* Chapter I. of this work.

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not desire to see the death of a sinner, but has made it incumbent on the legislator to convert and reform him.

3. A penalty must be indispensable, in order to be lawful. As soon as it can be shown that the purpose can be fully effected by a minor penalty, which the State has the power to inflict, the infliction of the greater penalty can no longer be justified. Death Punishment can no longer be justified, when it is proved that it is not indispensable. Now, if there is any real progress in modern civilization, it is certainly manifested in two different ways, viz. (1,) By a readier and more general recognition on the part of the public than heretofore, of the authority of the Government. (2.) By the great improvements which have been introduced in the mechanical arts, especially in architecture. Each of these results, characteristic of our age, tends to insure the fellow-citizens of any criminal, who is once brought under the custody of the law, against any injury he might, by a repetition of his crimes, inflict upon them. But, besides safely securing a prisoner within the walls of the gaol, the improvements in the construction of prisons have by experience already been proved to be productive of morally wholesome results. It has been shown, that in numerous cases great criminals have been so completely reformed while in prison, that without any risk to society they might be set at liberty and entirely pardoned. When pardon was granted, they justified by their conduct in after life the favourable expectations formed regarding them. It has, besides, been shown, that many of those criminals reformed during their imprisonment have made them-

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selves useful by deeds of devoted, unselfish charity, as, for instance, nursing the sick.[1]

We may fairly ask whether, after such experiences, the necessity of Capital Punishment can any longer be reasonably asserted. No arguments are forthcoming leading us to despair of the reformability of any criminal, it having been proved by the observations alluded to, that in many cases, years pass away, before the happy change takes place. After such experiences, society in general, and legislators in particular, are certainly bound to abandon Death Punishment, and to exert themselves to the utmost, in order to reform the captive criminal so as to reconcile himself to society by good conduct.

4. Death Punishment is not so effective in protecting society from criminal offences, as imprisonment. A penalty is so much the more effective, the more certain its infliction. Now, experience teaches, that in crimes legally threatened with death, the offender has much more probability of escaping, than in those menaced with another penalty. When imprisonment for life is threatened, the criminal has no hope of escaping the penalty—both discovery and condemnation being cer-

[1] In one house of correction, a robber and murderer had behaved so well for a long series of years, that pardon was to be granted to him. He declined the proffer, and requested that he might be employed in the prison at the most irksome work. When the cholera raged, many of the warders having died or fallen ill, that robber and murderer, with the utmost devotion, took upon himself the nursing of his diseased fellow-prisoners, and certainly saved many from death. NIEMEYER, in his *Lehrbuch der speciellen Pathologie*, 1861, vol. ii. p. 561, testifies that a murderer, sentenced to twenty years' imprisonment, nursed, with the greatest conscientiousness, patients suffering from typhus fever.

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tain, and no pardon likely to be granted. There is no excitement on the part of the public—such as often follows the passing of a capital sentence—and the sovereign is spared the painful position in which he, as a rule, is placed, whenever called upon to perform the difficult duty of confirming a capital sentence. Hence it can be understood, why practical lawyers in England have voted for the abolition of Death Punishment. The menace of imprisonment for life, in their opinion, has greater power of repression, and is certainly more to be relied upon.[1]

5. One of the greatest defects of Capital Punishment, is its irreparability. We have shown (Chapter XI.), that innocent persons have frequently been condemned and executed. This one quality—irreparability—alone ought to be quite sufficient to cause Death Punishment to be expunged from the code of every civilized nation. The awful idea, that the condemned person might possibly be innocent must haunt the mind of the judge, and render the duty of the monarch, who has to decide on granting pardon, still more arduous. The case which lately occurred at Mons, in Belgium, teaches a dreadful lesson. Two innocent persons were executed for a crime, probably perpetrated by others, who afterwards were brought before the courts of justice. This occurrence caused the jurymen to petition, that none of the newly condemned persons might be

[1] The statements made by judges of high rank and great experience in England and Ireland are very remarkable. *Vide* PHILLIPS: *Vacation Thoughts*, p. 150. The same view is taken by Mr. Edward Webster, in his paper read before the Society for the Amendment of the Law, on December 17, 1860.

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and explains, why the public in their ... desired that Capital Punishment should ...ished.[1]

B.—Death Punishment is not less objectionable with regard to its *expediency* than to its lawfulness. Criminal policy requires, that the legislator shall employ no penalty but that which is sure to be approved of, by the majority of the well-intentioned and well-informed of the nation. By acting otherwise, the legislator deprives judicial sentences of their moral weight, and provokes disaffection with, and exasperation against the Government. For this cause, one of the first German writers on criminal law[2] is certainly right in stating, that there is only one argument in favour of maintaining the penalty, viz., that it is still approved of and demanded by prevailing public opinion. But everything depends on the manner in which it is ascertained: what the average opinion of a great number of sensible and well-intentioned persons is. The opinion of the rude, thoughtless multitude, misled by precedent, and fond of exciting sights, must not be taken into account. The sensible portion of the people, in all countries, is becoming more and more alive to the objections to which Death Punishment is liable.

[1] That error is possible in every human judgment is a truism, that scarcely requires proof. But the dreadful consequences of error committed in passing a capital sentence, are scarcely fully appreciated. Both the probability of error and its dreadful importance are, to the best of our knowledge, in no other book so forcibly demonstrated as in PHILLIPS' *Vacation Thoughts*, p. 5.—ED.

[2] ZACHARIÆ, in *Archiv des Criminalrechts*, 1856, p. 104.

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The maintenance of Capital Punishment is accordingly attended with the following evil consequences :—

1st. Every execution calls forth great indignation on the part of many individuals—a state of things which must undermine the respect due to the Government. Besides, it is the duty of the legislature to anticipate the public excitement which is likely to increase at every new execution—a state of things which is prejudicial under all circumstances—and, if possible, ought to be avoided. Legislators yielded to public opinion in abolishing mutilating punishments, whipping and aggravated Death Punishments. They must also yield to the growing disapproval of Capital Punishment.

2ndly. Experience shows (Chapter IX.), that Death Punishment has in all countries the disadvantage of diminishing the repressive power of the legal menace. Witnesses, judges and jurymen, exert themselves to the utmost, in order to avoid arriving at a verdict of guilty, whenever a capital execution is its consequence. Hence it follows that many a criminal, who would certainly have been condemned if another penalty had been threatened, escapes his punishment altogether; and that, in those who are criminally disposed, if they regard the threatened penalty at all, the probability that Capital Punishment will not be inflicted, strengthens the resolution to commit the crime. The English lawyers, who, after the execution of Fauntleroy, petitioned in great numbers, in favour of the abolition of Death Punishment for forgery, made a correct calculation; their anticipation was fully justified by the results. The crime of forging bank-notes diminished, when no longer capitally punished.

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3rdly. The observations that have been made during executions (Chapter X.), must equally convince the legislator that Capital Punishment is attended with greater evil than good. If—what frequently happens—the fatal stroke fails, if the execution is carried out on an unconscious person, or a person lately recovered from a malignant disease, and recovered only so far as to enable him to be executed [1]—if the behaviour of the criminal, his extraordinary contrition, interests the public on his behalf—if his persevering assertion of his innocence impresses the public with the view that he ought not to have been executed—or if an execution is carried into effect whilst a short time before several greater criminals were pardoned,—the impressions produced will certainly be unfavourable to the authority of justice.

4thly. The difficulties connected with the deliberation (Chapter XIII.) whether a capital sentence is to be confirmed, or pardon to be granted, will, when duly considered, have some weight in making the abolition of Capital Punishment desirable. By abolition, the Sovereign would be spared the discharge of a painful duty; and the differences which so often arise between a Sovereign and his advisers on the one hand, and public opinion on the other, with regard to confirming the sentence or granting pardon, would be avoided.

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[1] Attention must be claimed to the peculiar circumstance which occurs when a pregnant woman is sentenced to death. In this case, the law orders the execution to be delayed. Have legislators duly weighed what effect the protracted agonies of the mother must have upon the unfortunate child?

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5thly. As to the deterring power of Death Punishment, and the influence which the legal menace of the penalty, its execution and its total or partial abolition, have upon the increase or diminution of crime in a country, it must be admitted that the legal threat held out with the *certainty* of its being carried into effect, cannot fail in preventing many a person, criminally disposed, from the perpetration of crimes; and that, likewise, an execution may frequently be productive of a frightening effect, and thereby prevent the commission of crime. But these are exceptional cases; and, as a rule, Death Punishment has not the effect of preventing the commission of crimes. For those who commit capital crimes do not think of the legal menace; or if they do, their minds are so preoccupied with their desire and intention, that the recollection of legal dangers loses its preventive influence, or the criminal depends upon his superior cunning and prudence to evade the infliction of the penalty. Experience has irrefutably proved, that in no country has the number of capital crimes been diminished by the re-enactment of Death Punishment, or greater strictness in its execution. On the contrary, after the abolition of the penalty, both for certain crimes and generally—the number of crimes decreased in a greater ratio than before, and the assertion often made, that after the abolition of Death Punishment, the number of capital crimes has increased—is either decidedly untrue, or at any rate, evidence is wanting that abolition was the cause of the increase.

In Tuscany, where Death Punishment has legally

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or actually been abolished for almost a century, the conviction gains ground every year, that Capital Punishment is an uncalled-for, useless, and even pernicious barbarity. The great majority of the Tuscan jurists agree in thinking, that Capital Punishment never ought to be re-enacted.[1] The re-enactment in those States of Germany in which the penalty had been abolished by the legislation of 1849, has been attempted to be justified on the ground of grave crimes having been committed. The advocates of the re-enactment have, however, omitted to ascertain whether the criminals, who committed murders in the years 1850 and 1851, were really aware that Capital Punishment had been abolished.[2] If the legislators at that time had honestly searched for truth (instead of being led astray by the passionate desire to obliterate every trace of 1848), they would have found that the crimes had been committed under peculiar circumstances, while the perpetrators were

[1] This has recently been stated as the deliberate opinion of three distinguished men—Poggi, Marzucchi and Andreucci. Bonaini, one of the greatest legal historians, had moved, in the Accademia dei Georgofili, a resolution to the effect that Death Punishment should be excluded from the Penal Code of the Kingdom of Italy. The opinion mentioned, which was given as a report, is decidedly in favour of Bonaini's motion.

[2] After Death Punishment had been some years abolished in Rhode Island, America, a motion was made for its re-enactment. The prison chaplain testified that the fact of the abolition was entirely unknown to the murderers. Respected lawyers of practical experience have assured the author, that in those German provinces in which murders were committed, 1849-50, the class to which the murderers belonged, was entirely unaware of the penalty having been abolished by the fundamental rights.

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entirely ignorant of the fact that Capital Punishment had ever been abolished.

With regard to executions, experience affords many irrefutable proofs, that the sight has no preventive effect on any one. Curiosity, desire of seeing how the criminal will behave, the riotous pleasure of being in a dense crowd, and the desire of witnessing an awful spectacle,[1] are the principal motives which animate those who gather round an execution. No one of the spectators seems to be impressed with the idea, that here an act of justice is being carried into effect. If it cannot be denied, that as a rule pickpockets are busily at work during an execution, that often, immediately after in the very neighbourhood, great crimes are committed (Chapter X.), and that many of those who perpetrated these crimes have been proved to have been eye-witnesses of the execution, one may fairly ask, how such observations can be reconciled with the wonderful deterring power attributed to the sight? After an execution at Newgate,[2] urchins enjoy themselves in performing a mock execution, one of them representing the culprit, a second the clergyman, a third the sheriff, and a fourth the hangman. Will that awful spectacle really deter them from the commission of crimes? Let those who still believe in the deterring power of executions, pay due attention to the facts ascertained by

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[1] We remind the reader, that even well-bred persons, on hearing that some one has fallen from the roof to the pavement, or somebody lies in the street seriously wounded, press forward, in order to have a very minute view.

[2] *Vide* PHILLIPS'S *Vacation Thoughts*, p. 84.

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the celebrated Berenger.[1] If execution really has the effect of diminishing crime, the number of capital crimes would be decreasing in those countries and in those periods, in which the greatest number of executions takes place. But statistics show (Chapter VIII.), that when and where the number of executions was greatest, capital crimes greatly increased, whilst in those periods during which few capital sentences were carried into effect, the number of capital crimes decreased. In an essay against Death Punishment in Belgium,[2] the various provinces of the country are compared with regard to executions and crimes. In two provinces (Limburg and Luxemburg), only one execution took place from 1830 to 1862; in Liège not a single one has taken place since 1825. The number of capital crimes decreased in Liège by 13 per cent.; in the years 1832 to 1835, there was one person accused in 66,475; in the years 1850 to 55 only one in 102,972. In the district of the Court of Appeal of Brussels, the number of executions from 1832 to 1862 was 25, and the number of accused persons increased within 20 years by 22 per cent. In the district of Gand, the number of executions was 22, and the increase of crimes amounted to 13 per cent.

The author will, by no means, from these facts draw the inference that the increase or decrease of capital

[1] Vide *La Repression Pénale*, pp. 465-468. How just are his observations at p. 466:—"C'est moins l'horreur du crime expié que les incidents du terrible drame auquel on a assisté, que deviennent le sujet des conversations; on oublie le crime, la juste peine, qu'il a encouru, pour ne plus songer qu'à la manière avec laquelle l'echafaud peut être affronté."

[2] *Suppléments au Journal la Meuse*, 15 Fevrier, 1862.

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crimes was the consequence of an increase or decrease of executions. But this much can, at any rate, be deduced from them, that the strict infliction of Death Punishment is, as a rule, inoperative in diminishing crime: it rather appears, that such an increased strictness has the effect of augmenting the number of crimes committed.

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CHAPTER XVII.

PROPOSITIONS FOR MITIGATING THE EVIL EFFECTS OF CAPITAL PUNISHMENT EXAMINED.

THERE are men in all countries, who, although desirous of seeing Death Punishment abolished, are yet still more afraid of the dangers to which society would be exposed, if the abolition of the penalty were carried into effect. These men are occupied with proposals for legislators, by which the evil effects of Death Punishment might be removed, while the penalty itself is maintained. We are in duty bound to examine the propositions advanced. They are as follows:—

I. A general belief prevails, that an important step would be gained if Death Punishment were abolished for political crimes. We have shown in a former chapter, that such an abolition has already been effected by the legislatures of France, Switzerland, and Portugal. Such a limitation of Death Punishment is undoubtedly important. No legislator can fail to see, that the feeling of Right in the people distinguishes between political and common crimes; that the boundary between what is admissible and punishable in politics is not clearly defined, and that the most virtuous men, the

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most enthusiastic lovers of their country, in the performance of their duty as citizens, may easily be induced to commit actions which a despot might consider worthy of punishment. Governments that recoil from no means for attaining their ends, may appeal to the right of necessity, appoint extraordinary courts of justice, and thus bring about a condemnation of those of whom they are afraid; or even in the ordinary courts secure a verdict of guilty, by appointing servile judges and by intimidating juries. It is not necessary that we should here refer to the testimony of the English and French revolutions, when judicial sentences were passed, and executions carried into effect, against thousands of innocent persons. Our own time supplies many instances of the same kind, on which posterity will pass a severe sentence. Pretences, for bringing about a condemnation for political crimes, are never wanting. In times of great political excitement there will be no lack of men who, either misled by cunning leaders, or animated by a noble enthusiasm for general reforms—perhaps even inspired by the hope, that by taking a practical interest in the movement, they might be able to avert great injuries, and to lead the overflowing ardour back into its legitimate channel—share in the popular movement; but, after its suppression, they are called to account by the authorities, and tried with a harshness all the more severe, because in such times the foundations of penal justice are shaken. With regard to politics, two parties are directly opposed to each other. One party, unjust to the desires of the age, is prone to condemn every reformer, and to do everything in its power to secure a verdict of guilty, whenever its adver-

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saries are brought to trial. Such a party becomes especially obnoxious, by its inveterate prejudice and overbearing zeal; whilst its opponents, mistaken as to the limits of their political rights, look upon their own deeds, not only as permitted, but even commanded by duty. Fair administration of justice being, in such times, out of question, every man condemned in a trial is considered by his partisans as a martyr, and penal sentences, especially those of death, are sure to provoke in the public disapproval of, and exasperation against the Government. Besides, as a rule, periods of excitement are followed by periods of tranquillity, during which, under the rule of a juster and milder system, it is gradually being admitted that penal justice was unfairly administered, and many a sentence too severe. As a natural result, the rulers then desire to make amends for the errors committed, and to act in a conciliatory spirit. When imprisonment is inflicted, the remainder of the sentence can at least be remitted; but for execution no compensation is possible. It is accordingly a matter of great importance that Death Punishment should not be threatened for political crimes. So far as this goes, the abolition of Capital Punishment for political crimes must be considered a great step gained. The excellent memorial of the Government of Belgium, of January 20, 1858, has very ably justified the abolition of the extreme penalty for political crimes in viewing them as actions which are looked upon in a different light in different periods and by various Governments, being called crimes by one and rewarded as meritorious deeds by its successor. The number of distinguished German

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criminal lawyers,[1] who consider Death Punishment for political crimes unjust, unnecessary, and inexpedient, is increasing.

But to believe, that abolition of Death Punishment in general was no longer a matter of importance, wherever it may be abolished for political crimes, would be a grave error. A close examination of single cases shows, how difficult it is to distinguish political from common crimes, because, on the one hand, under cover of politics, grave common crimes are frequently committed, whilst, on the other, it is exceedingly difficult to find out and strictly to define the secret motives which instigated the criminal. In France, where, in the year 1848, Capital Punishment for political crimes was abolished, judges and writers were at a loss whether to classify the grave offences committed as political or common crimes.[2] We have shown, in a former chapter, how the legislature of France came (1853) to re-enact Capital Punishment for certain political crimes.

In the discussions of Estates and Parliaments, Capital Punishment is, on the part of the official advisers of Governments, often defended on the plea of its being indispensable for cases of emergency, and important as a deterrent. The view is now gaining ground, that the penalty can be dispensed with for

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[1] *Vide* ZACHARIÆ: *Archiv des Criminalrechts*, 1845, p. 276; BERNER: *Abschaffung der Todesstrafe*, p. 33.

[2] Excellent remarks on this topic, in addition to those already referred to in Guizot's work, will be found in the speech delivered by the Duke Decazes in the Chamber of Peers, in 1832. Besides, in HELIE: *Théorie du Code Pénal*, Nos. 964-984, and in BERENGER: *De la Repression Pénale*, pp. 9-11.

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political crimes, and this must consistently lead to its general abolition.[1]

II. Another opinion, which in recent times has found a great number of adherents, is that all claims of justice would be satisfied if the menace of the extreme penalty were held out for *murder* only, whilst abolished for all other crimes. We have shown before, that in many of the American States the penalty has been confined to murder. The same limitation has taken place in the new penal draft of Bremen. This is an important object attained. The statements regarding the ratio of pardons granted to sentences passed, show besides, that in some countries (as, for instance, in England,) executions take place for murder only. But those who think that on this account the question of abolition has lost its importance, are mistaken. Those who hold this view can scarcely be acquainted with the history of German Penal Legislation, with the true nature of the crime of murder, nor with the effects of the legal menaces held out in modern codes. History affords evidence that, agreeably to ancient views, the term "murder," in all Germanic languages,[2] was intended to designate an event or deed of extraordinary importance,

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[1] Zachariæ, in the paper already quoted, declares Death Punishment for political crimes to be unjust, because it is opposed to justice to destroy the *man*, for having failed in the discharge of his duties as a citizen. It appears to us that this argument holds good against Death Punishment in general.

[2] Thus must the expressions "Mordbrand," "Mordlärm," be understood.

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an action of a shameful and indefensible nature.[1] The author of the *Carolina* adopted the views of the common unwritten law of his time, and accordingly furnished the judges with a distinction between murder and manslaughter, without, however, intending to imply, by the terms used, the legal definition of two different crimes. It was the fault of succeeding legislators to imagine, that by defining the qualities characteristic of murder they would designate that deed which, under all circumstances, should be punished capitally. Experience teaches,[2] that the terms used in statutes and law books are frequently ambiguous, and apt to lead juries astray; so that capital sentences for murder are frequently passed, which are revolting to the consciousness of Right in the people. Especially the Prussian legislator, by his selected characteristic "Deliberation" (Ueberlegung), has caused the passing of many unjust sentences.[3] It has several times occurred, that in those cases in which two persons, with mutual consent, had resolved to kill each other, sentence of death was passed on the survivor, and that then the judge presiding in the court of assizes gave expression to the public disapproval of such an enactment.[4] Thus the sense of Right in the public was hurt, and a disagreement between the bench and the legislation publicly

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[1] *Vide* OSENBRÜGGEN: *Beitrag zur Strafrechtsgeschichte der Schweiz*, 1859, p. 12; OSENBRÜGGEN: *Alemannisches Strafrecht*, pp. 208, 216; ZÖPFL: *Deutsche Rechtsgeschichte*, p. 949; *Archiv für Preussiches Strafrecht*, ii., p. 145.

[2] *Archiv für Preussiches Strafrecht*, v., p. 668; viii., p. 194. SCHWARZE, in *Gerichtssaal*, 1859, p. 322.

[3] Shown in the *Archiv für Preussiches Strafrecht*, viii., p. 303.

[4] *Archiv für Preussiches Strafrecht*, ix., p. 441.

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exhibited, was certainly not calculated to strengthen the respect due to the established authorities.

Legislators forget, that although the taking away of life admits of many degrees of guilt, the circumstances under which it is committed being exceedingly variable, and, in many cases, of such a description as greatly to diminish the guilt of the criminal, yet there is but one formula under which it is classified. No jurist will ever succeed in settling the distinction between murder and manslaughter by a given formula. People have imagined that the existence of emotion (German, *Affect*) was a proper characteristic for homicide; and theorists, in their study, may succeed in drawing the line of distinction between emotion and passion; but in actual life, that distinction is by no means so easy; the boundary lines by which a certain state of mind is separated from another are not clearly defined, these various states being distinguished only by inappreciable differences. That this begins to be recognized by legislators is seen from the fact, that they now define manslaughter by negative qualities only.

When a husband, irritated by the doubtful or faithless behaviour of his wife, first warns her in a friendly manner, afterwards exasperated by her sneering, strikes her, and she returns the blow; and he, after retaliation, resolves to kill her, one may fairly ask the question, whether in this case it would be possible to define at what exact time the emotion (Affect) was transformed into passion (Leidenschaft).[1] But the decision as to the nature of the crime committed,

[1] *Vide* the case in the *Archiv für Preussiches Strafrecht*, ii., p. 305.

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depends, nevertheless, upon that subtle question; the man has committed manslaughter, if he slew his wife in emotion; murder, if he has killed her in a passion. How much longer will legislators trifle with the lives of their fellow-men, by setting up such arbitrary, hair-splitting distinctions? When a wife who was ill-treated for years by her husband, and has unmistakable proofs of his faithlessness, at last desires to get rid of him, and when through his continued ill-usage the resolution of killing him is matured in her, and carried out after repeated provocation—one may well ask whether the deed of that woman is equal to the murder committed in cold blood by a mercenary assassin?

No wonder, then, that frequent and long-lasting contentions arise, in the courts of justice, as to distinction between murder and manslaughter, that not unfrequently a verdict of murder is returned by the majority of a single vote, and that often the sentence for murder passed by a lower court is changed into a sentence for manslaughter by a court of appeal.[1] It is, however, being more and more generally recognized, that there are innumerable degrees of guilt in killing, and that there are many cases of murder, for which the infliction of Death Punishment would be unjust. Accordingly, modern legislators have (1) established various degrees of evil

[1] *Vide* the remarkable cases given in *Preussiches Justizministerialblatt*, 1848, p. 251. Further *Archiv für Preussiches Strafrecht*, ii., p. 301; v., p. 668; vii., p. 638; viii., p. 65. Other cases in *Gerichtssaal*, 1859, p. 323; *Archiv des Criminalrechts*, 1855, p. 36; *Oesterreichische Gerichtszeitung*, 1854, p. 536; *Sächsische Gerichtszeitung*, 1860, p. 241; v. GROSS: *Zeitschrift für Strafrechtspflege*, iv., p. 482.

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intention;[1] or (2) distinguished murder of the first and murder of the second degree, inflicting Capital Punishment for the former only;[2] or (3) given authority to the judges to inflict, as an alternative, either death or imprisonment for life for the gravest crimes;[3] or (4) permitted, on account of extenuating circumstances, a milder penalty to be substituted for Death Punishment.[4]

A special cause of error in cases of murder is, that a great deal depends on the opinions of medical experts. Experience has proved, that these experts have frequently been mistaken, and thereby led judges and jurors astray. The consequence is, that sentences of death are passed on innocent persons, and that the painfulness of the situation of the Sovereign who has to decide on granting pardons, is increased.

Such being the case, we fully agree with a distinguished Prussian judge, M. Bornemann,[5] that Capital Punishment must be abolished, for murder also. And we adopt the opinion of Berner,[6] that abolition of Death Punishment for all crimes, murder included, will be the only means for getting rid of all artificial and arbitrary definitions. When this is done, the whole legislation, regarding murder and manslaughter, can be put on a far more sensible basis.

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[1] Such a rule was established in the Tuscan Courts when Death Punishment was re-enacted.

[2] For instance in America.

[3] In the Code of Brunswick, for example.

[4] For example, in France and Piedmont.

[5] *Preussisches Justizministerialblatt*, 1848, p. 253.

[6] BERNER: *Abschaffung der Todesstrafe*, p. 40.

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III. It has lately been urged, with much earnestness, that the greater portion of the objections against Death Punishment would be removed, if *executions were no longer performed in public.* Thus, at any rate, the revolting scenes which so often take place during public executions would be avoided, and no inducement for committing new crimes would be given by the brutalizing sight of a public execution. It is known, that in the legislation of America some of the States have been the first to introduce executions within the walls of the prison. Several German States have followed the example, especially Bavaria, which, in its Code of November 10, 1861, enjoins, in Article 15, that Sentence of Death shall be executed in an enclosed space, in the presence of a judicial commission and a functionary on the part of the public prosecution. It must be admitted that, while Death Punishment is maintained, the exclusion of publicity from executions obviates many disadvantages; but it appears as if the German legislators had not made themselves sufficiently acquainted with the difficulties of the matter. Here another gap is perceptible in the labours of our legislative assemblies. The question of excluding publicity from executions has, for a long time, been a subject of inquiry in England. It caused animated discussions in Parliament, which resulted in the confirmation of public executions. A Royal Commission appointed in 1856, examined a great many competent persons, as for instance, sheriffs, directors of prisons, clergymen and police functionaries, on the disadvantages of public executions. The Report contains numerous and very valuable practical observations: the majority of the

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committee were against public executions. The Rev. Mr. Clay, with an experience of 34 years as a prison chaplain, stated that he was convinced of the evil influence of public executions, and that an execution carried into effect within the walls of a prison would be productive of a stronger and more deterring impression on the imagination of persons not present.[1] In recent times, the Law Amendment Society caused a report to be made on the best manner of executing Death Punishment, and also on the desirability of its maintenance or abolition.[2] This report examined the statements contained in the report of the committee of 1856; besides, its author pointed to the great objections to private executions. It would certainly be necessary that they should be attended by officials possessing the full confidence of the public. And, even if such worthies could be prevailed upon, without fail, to perform that unenviable task, it might be questionable whether their presence afforded the same guarantee for fair play being observed in this most solemn and awful act of justice, as unrestricted publicity. After considering all details, the reporter arrives at the conclusion, that the menace and irremissible infliction of imprisonment for life would be a much more deterring and effectual preventive of crime, than Death Punishment. In order to give a true account of the actual state of public opinion in England regarding the publicity of executions, we claim attention to the fact that according to the state-

[1] *Vide* the *Prison Chaplain*, p. 350.

[2] Society for Promoting the Amendment of the Law—the report by Mr. Edward Webster, of December 17, 1860.

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ments of men who know the dispositions of the people (for instance, inspectors of police), the great majority of the English people are opposed to restricting the publicity, and that in the words of witnesses of experience, it cannot be gainsayed, that were private executions resorted to, a certain suspicion and distrust would prevail—a circumstance which certainly makes the publicity of executions desirable. A great many witnesses declare, that it would be strange to have the supreme and most significant act of justice performed privately, whilst all other actions of justice were performed in public.[1]

With regard to America, it must be said, that private executions have been introduced in a few only of the States, and those condemned by the courts of the Congress must everywhere be publicly executed, and that at these executions, in some of the States, the number of spectators amounts to several hundreds.[2]

The publicity of executions has been explicitly discussed in the legislative assemblies of Belgium and Piedmont, and has subsequently been made lawful in the recent Codes of both countries.

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[1] One of the witnesses giving evidence before the commission was a certain Herr von Katte, in the employ of the Prussian embassy. To the question, "Have you any reason for thinking that fewer murders have been committed since the introduction of the new system?" he replied, "Yes, I think that the number has been diminished." English lawyers are justified in finding fault with this rash answer, regarding which it does not appear on what arguments or experiences Herr von Katte founded his statement.

[2] For a dreadful account of the scenes which occurred in some of the States, see the *Journal of Prison Discipline*, Philadelphia, 1859, July, p. 117.

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In France the votes of distinguished men have been given against publicity.[1]

The discussions on the subject, which recently took place in Bavaria, are especially remarkable. The Government had proposed private executions in the presence of twelve recording persons (Urkund Personen), as far back as 1856, in the draft then laid before the Chambers; the committee of the second Chamber then voted for publicity, with the proviso, however, that children and females should not be admitted as spectators. The views of the first Chamber were unsettled,[2] many votes were given for full publicity for the sake of its alleged deterring effect; at last, restricted publicity was adopted by a small majority. When the new draft was discussed in 1859, the views of the committee of the second Chamber were favourable to restricted publicity. But in the united committees of both Chambers, the difficulty in warranting complete regularity by requiring the assistance of "recording persons" was duly perceived, the rigidity of compelling those persons to appear who were selected by the parish authorities was recognized, and accordingly the actual Article 15 was framed, in which it is expressed that they are by no means in duty bound to appear.

To sum up the views at which we have arrived regarding the publicity of executions:

1. Experience shows, that men are painfully affected not only by witnessing an execution, but by *knowing*

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[1] *Vide* BERENGER: *De la Repression Pénale*, pp. 466–471.

[2] *Verhandlungen des Gesetzgebungsausschusses der Kammer der Reichsrathe*, vol. i., pp. 96–106.

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that at a given time a fellow-man is being put to death. We put the question to every well-intentioned, not sentimental, but not inhumane, inhabitant of a city, whether his consciousness of an execution being carried out at any given moment would not painfully affect him?

2. The question is pressed upon us, whether it would not be more consistent to abolish Death Punishment altogether, when by surrendering publicity we give up the prescriptive plea for its maintenance. The ancient formulas for pronouncing sentences of Death Punishment purported to justify the penalty by its deterring power; but by abandoning publicity the legislators surrendered the principal argument in favour of the maintenance of the penalty.[1]

3. It cannot be gainsayed, that executions performed in private awaken suspicions in the people. When all the previous transactions connected with the trial have been carried on in public, they must be surprised that the last and most important act of all should be clandestinely performed.[2] This suspicion is greatly increased in those countries where Death Punishment is inflicted for political crimes. The worst that could befal a Government would happen if—what never can be entirely avoided—a secret execution were attended with such awful occurrences of despair in the culprit, or of

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[1] This argument is admirably stated in Dr. WINSLOW's *Journal of Psychological Medicine*, London, 1858, p. lxxxi.

[2] ZACHARIÆ, *Archiv des Criminalrechts*, 1856, p. 103, justly says, that the employment of recording witnesses rather engenders doubt in the minds of the people than confidence. In a similar sense Berner expresses himself in his work already quoted, p. 13.

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his offering fight, or of a miscarriage of the execution, as we have stated in Chapter X., foot-note (3), p. 141, &c. Rumour would not fail to spread the facts with the usual exaggeration, and to make the most of it to damage the authority of the Government.

4. The chief objection to secret executions consists in the difficulty of guaranteeing their regular and lawful performance. In America, as in some German States, recourse has been taken to the arrangement that persons should be officially appointed[1] to witness and record, that the penalty has been duly inflicted. But the question arises, are the persons selected to witness and record the execution bound to perform the duty imposed upon them, or are they at liberty to decline? In the first case a compulsion to perform such an unheard-of and new-fangled duty of a citizen must be considered unjust, and so much the more so, when it is certain that many persons cannot look upon such an act of butchery without material injury to their health.[2] If, on the other hand, (as was done in Bavaria,) it is left optional whether the appointed persons shall witness the execution or not, it might happen that no one chose to be present. The more civilization progresses, the more the aversion against the sanguinary spectacle increases,—the sooner it will come to pass that executions will have to be

[1] In England the proposition was made that the jurymen who returned the verdict should attend as witnesses of the execution; but Mr. Webster, in his report already quoted, p. 8, justly remarks that this would certainly result in a great many acquittals, because the jurors, if aware that a verdict of guilty would impose upon them the sad duty of being present at the horrible spectacle, would doubtless prefer returning a verdict of not guilty.

[2] BERNER: *Todesstrafe*, p. 13.

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performed without representatives of the people being present. That which happened during the last execution in Florence, where the people removed even from the streets along which the procession passed, might, with the progress of civilization, soon take place in other countries also.

5. The preceding paragraphs show the peculiar disadvantages attending private executions. It must nevertheless be admitted that, by restricting publicity, many of the objectionable qualities of the penalty are removed. But the most important objections against Death Punishment, are by no means invalidated by its being inflicted in private. Accordingly, we must decidedly oppose Death Punishment, even when privately inflicted.

IV. As a guarantee against the condemnation of innocent persons, two arrangements have been proposed, viz.,—

A.—That capital sentences, to be lawful, shall be passed unanimously;

B.—That imprisonment for life shall be substituted for Death Punishment, where circumstantial evidence only is forthcoming.

We can assent to neither of these propositions.

A.—Unanimity, as a condition of the validity of a capital sentence, was introduced into the legislation of Tuscany by the Grand Duke. In the Penal Code promulgated by the English Government for the Island of Malta[1] it is enacted, that the capital verdict of a jury not being unanimous, the penalty is to be commuted

[1] Code of March 10, 1854, art. 434.

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into imprisonment, for not less than twelve years. It is true, that by such enactments the number of executions, and the probability of innocent persons being capitally punished, may be diminished; but the difference of a condemnation by a majority or unanimity may be only the result of casual circumstances. Besides, in England and America, where unanimity is required to render a capital verdict valid, nevertheless innocent persons have been condemned and executed. Further, by making unanimity indispensable for the validity of a sentence, the legislator declares it to be requisite for doubtlessly ascertaining matters of fact. The public will accordingly look with distrust upon any verdict, returned by a majority of the jurors.

B.—The second proviso has been made, in all those German codes which admitted conviction upon circumstantial evidence, and even now the Austrian Order of Penal Proceeding contains the proviso alluded to. But sounder inquiry has justly shown, that it is not worthy of approval; it was only the offspring of the now obsolete view, which made a distinction between the so-called natural and circumstantial evidence, and asserted that the latter was less trustworthy than the former. This view is now generally recognized to be erroneous, although a close consideration of the matter shows that a certain mental operation is required to weigh and examine circumstantial evidence, and that unjust verdicts may easily be returned, unless the public prosecutor, the counsel for the defence, and the presiding judge strictly adhere to their duties, and act with careful circumspection. We have accordingly shown that, in cases supported by circumstantial evidence only,

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the duty of the Sovereign, who has to decide on granting mercy, becomes doubly painful. This is an additional reason why Death Punishment, which at the best can only be supported by the evidence of men liable to error, ought to be abolished. Besides, let it not be forgotten, that innocent persons have been executed on the false evidence of witnesses who were considered irreproachable. If upon merely circumstantial evidence no capital sentence is passed—which is the obtaining practice in Austria—the legislator declares, *ipso facto*, that this kind of evidence is fallacious, and thereby awakens the distrust of the people against the justice of all other sentences by which minor penalties have been inflicted upon circumstantial evidence.

We have endeavoured to show, that the science of jurisprudence, legislation, and experience combined tend to the abolition of Capital Punishment. When this result will be brought about, we do not presume to say. But as soon as the persuasion has become general, that Capital Punishment is neither necessary nor expedient, it will disappear as withered leaves fall in autumn. A great result will have been attained, when in the minds of all well-intentioned citizens the conviction gains ground, that with a well-arranged prison system, calculated to secure the moral reform of the prisoners, Capital Punishment can be replaced by an imprisonment, which, as it has been shown, is capable of facilitating the reformation of the most obdurate criminals. We conclude

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by quoting the words of an American statesman,[1] distinguished by his position, character, and experience,—viz., the Governor of Massachusetts, who, in his official message referring to Capital Punishment, said:—

"I regret that Death Punishment still holds its place in the Code of Massachusetts, while gradually disappearing from the legislations of all civilized nations since it has been recognized to be not necessary, but even dangerous, by operating on some persons injuriously, and on others perniciously. The study and reflection of a series of years confirm the conviction, that this punishment must disappear from the number of penalties deemed lawful in the best governed and most civilized States. A proceeding natural in the administration of justice among savages during ruder forms and lower conditions of society, a rigid necessity sometimes subsequent to times of warfare,—this penalty in a State like ours causes the scaffold only to be erected to serve as a horrible spectacle, exciting the imagination and pursuing sensitive men in their dreams as a not yet abolished remnant of ages of barbarity, whilst it appears to the hardened criminal to be only another disease by which nature pays the unavoidable debt of mortality."[2]

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[1] Address of his Excellency J. Andrew to the two branches of the Legislature of Massachusetts, January, 1862, Boston, 1862, p. 45.

[2] The author has just received the draft of the Portuguese Penal Code for 1862. According to articles 65 and 103, women cannot be condemned to death. This enactment may be understood from the fact, that since 1777 no woman has been executed. In connection with this subject the work of a distinguished criminal lawyer may be consulted, —viz., BONNEVILLE DE MARSANGY: *Moralité comparée de la Femme et de l'Homme au double point de vue de l'Amélioration des Lois Pénales et des Progrès de Civilisation*: Lisbonne, 1861.

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CHAPTER XVIII.

CAPITAL PUNISHMENT IN ENGLAND.

In the preceding chapters we have considered Capital Punishment in its general bearings. We have laid before the English public the views of the man who, as we think, in the present generation knows most of the subject. Whatever historical or juridical learning, whatever knowledge of actual life, intercourse with men of every social rank in the principal countries of Europe, whatever an uninterrupted correspondence with competent men in all countries can suggest, has been collected by Professor Mittermaier, and this accumulated evidence has been digested with the judgment of a trained intellect, and discussed with the lively interest in the welfare of the human race, indispensable for a subject of this general importance.

We propose in this concluding chapter to say a few words on the question, "Shall Capital Punishment be maintained or abolished in England?"

It is now nearly three hundred and fifty years since Sir Thomas More, the then Lord High Chancellor, expressed the opinion that even the greatest criminals

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should be punished with imprisonment for life, and that only those of persevering, rebellious and indomitable ferocity, should be strangled like brutes, untameable by prison or chain.[1]

The time for such exceptions is past. Our prison walls render the most inveterate ferocity harmless; solitary confinement tames even those that seemed to be indomitable.

Thomas Hobbes looked upon criminals as enemies of the State. Their destruction was, in his opinion, a measure of self-defence on the part of the State in legitimate warfare.

If it were possible that by a sudden event all our imprisoned criminals were simultaneously set free, the structure of our social and political institutions is based on too solid a foundation, to be endangered for a moment by their combined efforts.

Our legislators may, therefore, look at the facts with

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[1] "Cæteris facinoribus nullam certam pœnam lex ulla præstituit, sed ut quodque atrox, aut contra visum est, ita supplicium senatus decrevit. Uxores mariti castigant et parentes liberos, nisi quid tam ingens admiserint [sic!] ut id publice puniri morum intersit; sed fere gravissima quæque scelera servitutis incommodo puniuntur, id siquidem sceleratis non minus triste, et reipublicæ magis commodum arbitrantur quam si mactare noxios et protinus amoliri festinent. Nam et labore quam nece magis prosunt, et exemplo diutius alios ab simili flagitio deterrent. Quod si sic habiti rebellent atque recalcitrent, tum demum velut indomitæ belluæ, quas cohercere [sic!] carcere et cathena [sic!] non potest, trucidantur. Ab patientibus non adimitur omnis omnino spes, quippe, longis domiti malis, si eam pœnitentiam præ se ferant, quæ peccatum testetur magis eis displicere quam pœnam, principis interdum prærogativa, interdum suffragiis populi, aut mitigatur servitus aut remittitur."—*Utopia, Libellus vere Aureus*, &c.—Cura M. Petri Ægidii Anuerpiensis et arte Theodorici Martini Alustensis, Typographi almæ Lovanensium Academiæ, nunc primum accuratissime editus.—[Anno MDXVI.]

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that calmness which becomes their calling; they may divest their minds of fear and passion, and, while with undiminished energy carrying on their warfare against crime, be mindful of the fact, that this is no warfare against individual criminals. Individual crimes are to the legislator symptoms of disease in the social body. To kill individuals is acting like the quack doctor who, by contending against a particular symptom, produces a greater malady than the one he was called to cure.

There are two questions on which the legislator must be satisfied, viz.,—

1. By what causes has the crime been produced?

2. By what legislative measures can crime be most effectively diminished?

It is evident from the results of Parliamentary inquiries, and has been shown by able writers,[1] that while the severity of our penal code has been constantly mitigated, the number of those crimes, which were formerly capitally punished, has not increased.

But this is not the only point on which our statistical inquiries have enlightened us. It can actually be shown, and will become more apparent every year, that the very existence of crime, in the most numerous and most prominent cases, is the result of a shortcoming in our political and social institutions and arrangements.

It was a true human instinct of ancient nations, that made them recognize the corporate responsibility of a whole community for any crime committed by one of

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[1] Vide *Crime, its Amount, Causes, and Remedies*, by Mr. FREDERIC HILL, 1853, p. 4, &c.

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its members. The human individual is not and has scarcely ever been an isolated being. The roots of his existence are, as it were, struck in a social body, and whatever good or evil deed he may commit, is to a certain degree shared by the community of which he is a member. Had the instinctive sagacity of the ancients, that taught them their corporate responsibility, not been combined with the superstitious notion of a wrathful deity—Death Punishment would never have stained a Criminal Code. This remnant of a barbarous antiquity must be abolished before we can justly boast of our civilization.

That no human institution is perfect, and that no problem has so much puzzled the wisest of men, as to define even in theory an outline of a perfect State—are truisms which scarcely deserve mentioning, but for the inferences we intend to draw from them.

We assert, that this country in its political institutions, social arrangements and industrial habits—in one word—in the complicated structure of State and Society, has defects causing whole classes to fall into vice, which unavoidably conducts a certain portion to the commission of crime.

We shall illustrate our assertion by a few examples.

I. The average duration of life of the grinders of Sheffield varies from twenty-nine to thirty-eight years.[1] The total number of persons employed in this trade amounts to about 3,000. The men are gradually killed by the inhalation of dust and other gritty particles,

[1] *Vide* Dr. Wynter's *Curiosities of Civilization*, London, 1860, p. 502.

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given off by the grinding-stones and the metal implements ground on them.

The consequence of such an unwholesome occupation must be disease of both body and mind, and the men being fully aware of the short duration of their lives, are naturally induced to manifest a recklessness similar to that which we find in other countries during the prevalence of a pestilence. Serious doubts suggest themselves, whether men living under these circumstances are as responsible for their actions as other men —and whether society at large, by binding them to such employment, ought not to share their moral, and by right their penal responsibility.

II. In the bleaching crofts of Lancashire and elsewhere, men and women, and children of both sexes, are promiscuously employed day and night in a temperature, in some departments, as high as 130°, or even 150°. The sexual demoralization consequent upon this state of affairs is, as a matter of course, great; but the worst feature is, that infanticide by neglect—by laudanum given to appease hungry, crying babies during the absence of their mothers—or even intentionally to poison them, becomes a common crime, and is looked upon by the factory population as a light and venial misdemeanor.

It is a recognized fact, that our industrial arrangements among this class of our fellow-subjects, have the effect of almost entirely destroying the love of mothers for their offspring. The rate of mortality of children in the districts referred to is enormous. It is only the most robust among them that survive, and they in their infancy are almost entirely bereft of the tender care of

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a mother. Now, it is almost universally acknowledged that most of those who ever have, morally or intellectually, distinguished themselves, are specially indebted to the love, training, and example of their mothers. We deprive a considerable portion of our fellow-men of the most sacred and the most wholesome of all teachings. Are we right afterwards in judging them by the same laws which have been framed for men who, during their infancy, were watched and trained by the care of a mother? And should any of them commit a capital crime, is there no other atonement for OUR shortcomings, than by killing the man, whom we have wronged from the hour of his birth?

III. The Earl of Shaftesbury has, in some of his speeches,[1] stated that a great portion of the vice and crime with which society is infested, must be attributed to bad air and bad water. Bad air in houses and streets, bad water as beverage, causes disease of the body and soul, and fosters idleness and drunkenness—vices which, with almost unfailing certainty, lead to crime. When crimes have been committed, who is the physician we apply to to cure the diseases caused by the ignorance and selfishness of our forefathers, and to a certain extent, fostered by our own ignorance and selfishness? THE HANGMAN.

Many abuses have been reformed since the days of John Howard, but many a reformer of his stamp must set his face against existing abuses, before they are abolished.

[1] For instance, *vide* his Lordship's address as President of the National Association for the Promotion of Social Science, at Bradford, 1859.

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We must, however, guard against being misunderstood. We do not plead that crimes should be left unpunished, on account of the unfavourable circumstances in which the criminal may have passed his previous life. We admit that the legislator can lay down no strict rule for measuring the degree of moral guilt in every crime, and for making the penalty commensurate with that standard. It may be that legislators in the main are reduced to define certain actions as criminal, and to menace the perpetrators with certain penalties. The only question which here concerns us is, whether Death Punishment shall any longer remain a lawful penalty in England. We do not hesitate to assert that it ought to be abolished.

The previous pages contain many instances, in which the moral reform of great criminals has been effected. This fact is corroborated by the annals of our prisons, and the statements made before Parliamentary Committees. There is no evidence extant, warranting the assertion that the reform of any criminal is impossible; but even if criminals could not be reformed, the legislature, acting on behalf of the nation, would have no right to kill them for having committed crimes, the guilt of which is, to a greater or smaller degree, shared by every member of the community.

The prisons of our day afford ample means for preventing culprits from inflicting fresh injuries on their fellow-men.

The intelligent and benevolent portion of the public are favourable to the abolition of the penalty, and a wise legislature ought to be rather a step in advance, than behind the enlightened opinion of the country.

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England is not lacerated by civil war, not threatened with revolution. No other country is so favourably situated for abolishing the barbarous punishment.

The great argument of the advocates of the penalty is its deterring effect; but a man of long experience, keen observation, sober judgment—Mr. Alderman Harmer[1]—has, by his evidence given forty-five years ago, demolished this argument.

The possibility of error in judgment, the danger of committing judicial murders, has been emphatically dwelt upon by Mr. Charles Phillips. On this point we need only refer to his work.[2]

If justice is to be realized according to the demands of our age, if the prestige of England among the nations of the earth is to be maintained, this barbarous punishment must be abolished.

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[1] *Vide* Mr. Alderman Harmer's evidence in Appendix H.

[2] Mr. CHARLES PHILLIPS'S *Vacation Thoughts on Capital Punishment*: London, 1858, pp. 5—13.

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APPENDICES.

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APPENDICES.

APPENDIX A.

Porcia Lex.

(Referred to in the text, page 4.)

"Porcia tamen lex sola pro tergo civium lata videtur, quod gravi pœna, si quis verberasset necassetque civem Romanum, sanxit."—Liv. x. 9.

The views of the Romans with regard to Capital Punishment at that period when the Republic verged towards its end, are in no author better illustrated than in Sallust, who, in the last chapters of his *Catiline*, reports the debates of the Roman Senate with his characteristic terseness of style. The interest of this part of the history is heightened by the fact, that Caius Julius Cæsar, then a young man, although suspected of complicity in the conspiracy, stood forth as the champion of the Lex Porcia, and accordingly both spoke and voted against the application of Capital Punishment. We must admire either his moral courage—if the suspicion against him was unfounded—or his boldness if, what is more probable, he was really implicated in this conspiracy. Marcus Porcius Cato, on the other hand, the steadfast defender of republican law, thought the circumstances dangerous enough to require that the prisoner should be brought to death even against the tenor of the Lex Porcia.—*Vide* Sallust: *Catil.*, cap. 48–61.

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"The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished; under the emperors, severe punishments were revived—and then the empire fell."—STEPHEN'S *Commentaries on the Laws of England*, fifth ed., vol. iv., p. 104.

APPENDIX B.

SIR THOMAS MORE.

(*Referred to in the text, page* 11.)

MR. J. S. BREWER'S *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII.* London: 1864.

No. 3159, a letter written by Nicholas Sagudino to Marcus Musurus in Venice, and dated London, April 22, 1517, gives too lively a character of this celebrated man to be omitted. He says of Sir Thomas More:—

"Totum me ei addixi insinuavique; in cujus mellitissima consuetudine tamquam in amœnissimo diversorio sæpe acquiescere soleo; illeque, qua est humanitate vir, perbenigne amanterque me videt et excipit, quo fit ut numquam eum conveniam quin me doctiorem suique amantiorem dimittat."

Again, in No. 3627 of Mr. Brewer's *Letters and Papers*, we find the following, from "Erasmus to John Frobenius:"—

"Had always a high opinion of More, but feared his friendship for him might have warped his judgment. Now he sees that opinion confirmed by all the learned. What might not such genius have accomplished had it been trained in Italy, or been devoted exclusively to study? When quite a boy More composed epigrams; yet he has never been out of England, more than once or twice on an embassy to Flanders. Besides the care of a wife and family, state and legal employments, he is so much occupied, it is a wonder he can find time for books. Louvain, Aug. 25, 1517."

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APPENDIX C.

John Howard.

(*Referred to in the text, page* 16.)

Mr. Thomas Carlyle, in his inimitable *Latter-Day Pamphlets* —"Model Prisons," pp. 17, 18, 19, &c.—sums up the evidence on Howard and his work in the following terms :—

"Howard is a beautiful philanthropist, eulogised by Burke, and, in most men's minds, a sort of beatified individual. How glorious, having finished off one's affairs in Bedfordshire, or, in fact, finding them very dull, inane, and worthy of being quitted and got away from, to set out on a cruise over the jails, first of Britain; then, finding that answer, over the jails of the habitable globe! 'A voyage of discovery, a circumnavigation of charity: to collate distresses, to gauge wretchedness, to take the dimensions of human misery'—really it is very fine. Captain Cook's voyage for the terra Australis; Ross's, Franklin's, for the ditto Borealis. Men make various cruises and voyages in this world,—for want of money, want of work, and one or the other want,—which are attended with their difficulties, too, and do *not* make the cruiser a demigod. On the whole, I have myself nothing but respect, comparatively speaking, for the dull, solid Howard, and his benevolence, and other impulses that set him cruising. Heaven had grown weary of jail-fevers, and other the like *un*just penalties inflicted upon scoundrels, for scoundrels, too, and even the very devil, should not have more than their due;—and Heaven, in its opulence, created a man to make an end of that. Created him; disgusted him with the grocer business; tried him with Calvinism, rural ennui and sore bereavement in his Bedfordsire retreat;—and, in short, at last got him set to his work, and in a condition to achieve it. For which I am thankful to Heaven; and do also, with doffed hat humbly salute John Howard. A practical, solid man, if a dull and

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even dreary; 'carries his weighing-scales in his pocket:' when your jailor answers, 'The prisoner's allowance of food is so and so: and we observe it sacredly; here, for example, is a ration.' 'Hey! A ration this?' and solid John suddenly produces his weighing-scales; weighs it, marks down in his tablets what the actual quantity of it is. That is the art and manner of the man. A man full of English accuracy; English veracity, solidity, simplicity; by whom this universal jail commission, not to be paid for in money, but far otherwise, is set about, with all the slow energy, the patience, practicality, sedulity and sagacity common to the best commissioners paid in money and not expressly otherwise.

"For it is the glory of England that she has a turn for fidelity in practical work; that sham-workers, though very numerous, are rarer than elsewhere; that a man who undertakes work for you will still, in various provinces of our affairs, do it, instead of merely seeming to do it. John Howard, without pay in money, *did* this of the jail-fever, as other Englishmen do work, in a truly workmanlike manner; his distinction was that he did it without money. He had not 500*l.* or 5,000*l.* a year of salary for it; but lived merely on his Bedfordshire estates, and, as Snigsby irreverently expresses it, 'by chewing his own cud.' And, sure enough, if any man might chew the cud of placid reflections, solid Howard, a mournful man otherwise, might at intervals indulge a little in that luxury. No money salary had he for his work; he had merely the income of his properties, and what he could derive from within. Is this such a sublime distinction then? Well, let it pass at its value. There have been benefactors of mankind who had more need of money than he, and got none, too. Milton, it is known, did his *Paradise Lost* at the easy rate of five pounds. Kepler worked out the secret of the heavenly motions in a dreadfully painful manner; 'going over the calculations sixty times'—and having not only no public money, but no private either, and, in fact, writing almanacs for his bread-and-water, while he did this of

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the heavenly motions—having no Bedfordshire estates, nothing but a pension of 18*l.* (which they would not pay him), the valuable penalty of writing almanacs, and at length the invaluable one of dying, when the heavenly bodies were vanquished, and battle's conflagration had collapsed into cold dark ashes, and the starvation reached too high a pitch for the poor man. Howard is not the only benefactor that has worked without money for us; there have been some more—and will be, I hope! For the Destinies are opulent, and send here and there a man into the world to do work, for which they do not mean to pay him in money. And they smite him beneficently with sore afflictions, and blight his world all into grim frozen ruins round him, and can make a wandering exile of their Dante, and not a soft-bedded podesta of Florence, if they wish to get a *Divine Comedy* out of him. Nay, that is rather in their way, when they have worthy work for such a man; they scourge him manifoldly to the due pitch, sometimes nearly of despair, that he may search desperately for his work, and find it; they urge him on still with beneficent stripes when needful, as is constantly the case between whiles; and, in fact, have privately decided to reward him with beneficent death by-and-by, and not with money at all. Oh, my benevolent friend, I honour Howard very much; but it is on this side idolatry a long way, not to an infinite, but to a decidedly finite extent! And you—put not the modest, noble Howard, a truly modest man, to the blush, by forcing these reflections on us! . . . .

"Howard abated the jail fever; but it seems to me he has been the innocent cause of a far more distressing fever which rages high just now—what we may call the benevolent-platform fever. Howard is to be regarded as the unlucky fountain of that tumultuous, frothy ocean-tide of benevolent sentimentality, 'abolition of punishment,' all-absorbing 'prison-discipline,' and general, morbid sympathy, instead of hearty hatred, for scoundrels; which is threatening to drown human society, as in deluges, and leave, instead of an 'edifice of society' fit

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for the habitation of men, a continent of fetid ooze, inhabitable only by mud gods and creatures that walk upon their belly. Few things more distress a thinking soul at this time."

APPENDIX D.

Edward Livingston.

(*Referred to in the text, page* 44.)

Edward Livingston, the celebrated lawyer and statesman of the United States of America, was a descendant of an ancient Scotch family, that, in the course of the seventeenth century, emigrated and settled on the banks of the Hudson. He was born at New York in the year 1764. His father, member of a court of law in the same city, lost his appointment, because he defended the colonial interest against the Government of the mother country. Edward, the youngest of nine children, chose the law as his profession, and was a respected and successful attorney when the city of New York elected him for its representative in Congress. After having filled important functions in New York, he emigrated, in the year 1802, to Louisiana, which State, shortly before, in consequence of the negotiations conducted in Paris by an elder brother of Livingston, had been ceded to the United States. He settled as advocate in New Orleans, and greatly distinguished himself by his works on legislation for Louisiana. During the war with England he turned soldier, and became adjutant to his friend Jackson, and earned a high reputation for his valorous conduct in the battles of December 22, 1814, and of January 8, 1815. After the restoration of peace, he returned to his professional duties, and in the year 1821 received the commission from the Legislative Assembly of Louisiana to design a Criminal Code. His manuscript being destroyed in a conflagration in the year 1824, he re-wrote it by long and painful labour. This Penal Code was adopted by Louisiana and some

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other of the United States, besides by Guatemala, Brazil, and some other States of Southern America. It is founded upon British and French law; simple, plain, concise, and is considered one of the best Penal Codes extant. Capital Punishment is abolished, and penitentiary imprisonment introduced in its stead.

Livingston represented Louisiana several times in Congress, and was, in 1831, under Jackson's presidency, appointed Secretary of State.

In 1833 he was sent as ambassador of the United States to Paris, where he, with great zeal and energy, insisted upon the payments due to the United States. He died soon after his return, in the year 1836, on his landed estate, Montgomery.

APPENDIX E.

Capital Punishment.

Twelve Divisions of the Subject drawn up for Research.

(*Referred to in the text, page* 51.)

1. An inquiry respecting—The expediency, or otherwise, of a judicial recognition of the widely-varying degrees of guilt and provocation connected with some murders, as distinguished from others.

2. An inquiry respecting—The effects of public executions, as at present conducted in this country.

3. An inquiry respecting—The effect of private executions, as conducted in some of the British colonies and elsewhere.

4. An inquiry respecting—The extent to which irrevocable capital inflictions unfavourably influence the production and reception of evidence in murder cases, when similar evidence would be both readily forthcoming, and also accepted as fully warranting a conviction for any crime not followed by a result so awful and irrevocable.

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5. An inquiry respecting—The influence of the abolition of Capital Punishment on the public security from the worst crimes, as indicated by the comparative increase or decrease, both of committals and of convictions in proportion to those committals, in the case of such crimes of this description as have ceased to be capital in this country.

6. An inquiry respecting—The comparative number of murders and homicidal crimes committed in certain localities, in given equal periods of time, subsequent and antecedent to the occurrence of executions in the said districts, and particularly where several executions have taken place within a short time of one another.

7. An inquiry respecting—The penal, and also occasionally, reformatory influences of life-long punishment for murder.

8. An inquiry respecting—The possible, though now very exceptional, occurrence of irreparable legal injury arising from mistaken convictions for murder.

9. An inquiry respecting—The practical influence and results attendant on the abolition of Capital Punishment for murder in several foreign countries.

10. An inquiry respecting—The influence on the public mind, and in particular on the criminal population, of the uncertain execution, and of the practically indecisive nature, of judicial sentences for murder, in consequence of the frequent commutations arising from the modifying action of the Home Office, and from the strong expression of public opinion in certain cases.

11. An inquiry as to—Whether such frequent interferences with the execution of the statute-laws respecting murder are not absolutely inevitable under the existing state of those laws and of public opinion.

12. An inquiry respecting—The number of instances of murder committed by persons, whose physiological and mental antecedents necessitate just apprehensions of their being wholly, or in great degree morally, responsible; and which, therefore, also frequently necessitate a collision of opinion

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and of action between the highest legal and the highest medical authorities of the country,—a collision most undesirable in itself, yet now repeatedly entered upon, with the object of preventing, if possible, the unseemly spectacle of an unfortunate person of homicidal mania being punished with death for a natural and unavoidable calamity; a calamity which some other system than that of Capital Punishment would entirely prevent, whilst, at the same time, perfectly securing the public from further dangers from the person so afflicted.

WM. TALLACK.

July 26, 1864.

[The following is the copy of a letter from Professor T. C. Upham, of Bowdoin College, Maine, to Mrs. Harriet Beecher Stowe, in reply to her request for information on behalf of the Anti-Capital Punishment Society in London. It has been kindly placed at the disposal of the editor by Mr. Tallack :]—

"*Brunswick, Maine, Oct.* 15, 1864.

"RESPECTED MADAM,—You request me to give an answer to certain inquiries proposed to you by Mr. Tallack, secretary to the Society for the Abolition of Capital Punishment in London. The state of my health will not allow me to go very fully into the subject; nor am I able to say that I possess the means of information which will enable me to speak with entire confidence. Nevertheless I think I should be likely to know, as I have long been interested in the subject, and have often made inquiries.

"In answer to Mr. Tallack's first inquiry, namely, what has been the result of the abolition of the death penalty in Rhode Island, Michigan, and Wisconsin? I would say, so far as my information goes, the majority of the people continue to be satisfied with the change.

"Were it otherwise, in any considerable degree, they would be likely to return to their former system. I have not learned that any of the States of the American Union which

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have abolished Capital Punishment, or have greatly modified their criminal codes in that particular, have taken any steps backward. I understand that some attempts of this kind have been made in Rhode Island and Michigan, but have failed.

"The second question proposed by Mr. Tallack is, whether the system of private executions is free from the evils attendant on public ones, and whether there are not some special disadvantages connected with them?

"I believe it is the general sentiment, that the immense evils attendant on public executions are avoided, for the most part, by the present method; although some may think that we lose something in the matter of example, and also that, in certain conditions of society, the private method might possibly be perverted to unjust purposes.

"In the State of Maine, where I reside, I regard the public sentiment as strongly in favour of private executions, as compared with public ones.

"The system of the State of Maine, which has existed about thirty years, is somewhat peculiar. It recognizes the right of Capital Punishment, but limits its infliction to the crime of murder. It requires also, that it shall not be inflicted until the expiration of a year, which gives time to the criminal for reflection and repentance, and also for the appearance of new evidence, if he should happen to have been unjustly condemned. At the expiration of that time, when public sentiment against the criminal has become less excited, it is left optional with the Governor of the State to order him to execution or to detain him in prison, according as his views of the good and safety of the State may require.

"This system, without giving up the principle of Capital Punishment, is, practically, almost an abolition of it. During the thirty years of the existence of this system, one person only has been executed under it, who had added to his previous crime that of killing the warden of the State prison.

"I am inclined to give the preference to this system over any other with which I am acquainted. Many things can be

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said in its favour, and I have yet to learn that the people of the State do not generally feel as secure as they did under former systems. Yet I think it ought to be added that much of this feeling of security is to be ascribed to the temperate habits of the people, and to the great pains taken to educate all classes.

"On the third question, namely, whether imprisonment with hard labour for life, or for a term of years, can be adopted as a safe substitute for the gallows, it is certainly right to say, that the experiences of this country look favourably in that direction.

"It is right, in my opinion, to remember that the criminal is still a man; and while we make the protection of society the first object, we are not to cease to do him good.

"In some cases, at least, only the Infinite Mind can understand the amount of his temptations and sufferings. And we all stand in need of forgiveness.

"Dear madam, I have thus briefly expressed my opinions. It is all I can do in my present situation. If you think them of any worth you may transmit them to Mr. Tallack.

"Respectfully and sincerely yours,

"THOMAS C. UPHAM."

"Mrs. H. B. Stowe."

APPENDIX F.

EXCERPT FROM A SPEECH OF MR. J. BRIGHT, M.P.

(*Referred to in note, page* 53.)

MR. JOHN BRIGHT, in the debate in the House of Commons on Tuesday, May 3, 1864, upon Mr. Ewart's motion for a select committee, to inquire into the expediency of maintaining the punishment of death, said:—"Since this notice was given by my hon. friend, I took the liberty of writing to the governors of three of the States of America in which Capital Punishment

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has for several years been abolished; and, with the permission of the House, I will read extracts from the answers which I have received.—(Hear, hear.)—I think they are important in a discussion of this nature, when we are attempting to persuade doubtful and timid people that we are not proposing a rash or dangerous change. In the State of Rhode Island, one of the small States of America, with a population of not more than 200,000, Capital Punishment has been abolished. The governor, the Hon. J. Wye Smith, writing from the Executive Department, March 21, 1864, says:—

"'1. The death penalty was abolished in this State in the year 1852. 2. I do not think its abolition has had any effect upon the security of life. 3. Is the law against the death penalty sustained by the public opinion of the State?—Very decidedly. 4. Are convictions and punishments more certain than before the change was made?—I think they are. 5. What is the punishment now inflicted on such criminals as were formerly punished with death?—Imprisonment for life at hard labour. I have conversed with one supreme judge, State attorney, and warden of the State prison, and they support my own established view upon the subject.'

"In a second letter, dated April 4, he says:—'Our present able Chief Justice says:—"Although opposed to the present law when passed, I am equally opposed to a change in it until the experiment has been tried long enough to satisfy us that it has failed. I am clearly of opinion that the present state of the law is sustained by public opinion; and I believe it will continue to be until it is satisfactorily shown that crimes against life have been considerably increased in consequence of it. My observation fully justifies me in saying that conviction for murder is far more certain now in proper cases than when death was the punishment of it."'

"Here is the answer which I received from the Hon. Austin Blair, the Governor of the State of Michigan:—'1. The death penalty for murder was abolished March 1, 1847, when the revised statutes of 1846 went into effect. 2. Life is not

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considered less secure than before; murders are probably less frequent in proportion to population. Twenty years ago the population of the State was 300,000, and we have now a population of about 900,000. Then it was chiefly agricultural, and now we have mines of copper, iron, coal, &c., bringing into proximity dissimilar classes, and increasing the probabilities of frequent crime. Before the abolition of the death penalty murders were not unfrequent, but convictions were rarely or never obtained. It became the common belief that no jury could be found (the prisoner availing himself of the common-law right of challenge) which would convict. Since the abolition there have been in seventeen years thirty-seven convictions. 3. There can be no doubt that public opinion sustains the present law and is against the restoration of the death penalty. 4. Conviction and punishment are now much more certain than before the change was made. Murder requires a greater amount of proof than any other crime, and it is found practically that a trial for murder excites no very unusual interest.'

"It therefore does not make a hero of the criminal. The letter proceeds:—'5. The punishment now is solitary confinement at hard labour for life. Since 1861, this class of prisoners have been employed as other prisoners, as it was found difficult to keep them at work in cells without giving them tools, and there was danger of their becoming insane. The reform has been successfully tried, and is no longer an experiment.'

"The last letter is from the Hon. J. S. Lewes, the Governor of Wisconsin, and is dated March 29, 1864:—'The evil tendency of public executions, the great aversion of many to the taking of life, rendering it almost impossible to obtain jurors from the more intelligent portion of the community, the liability of the innocent to suffer so extreme a penalty and be placed beyond the reach of the pardoning power, and the disposition of courts and juries not to convict, fearing the innocent might suffer, convinced me that this relic

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of barbarism should be abolished. The death penalty was repealed in 1853. No legislation has since re-established it, and the people find themselves equally secure, and the public more certain than before. The population in 1850 was 305,000; in 1860 it was 775,000. With this large increase of population, we might expect a large increase of criminal cases; but this does not appear to be the case.'

"If you take those two last States of Wisconsin and Michigan, which have been recently settled, you will see that it was highly probable, as has been found in the outskirts of advancing civilization, that crimes of violence should not be uncommon. But here, with the abolition of this punishment, crimes and violence are not more common than before; people are just as secure, the law is upheld by public opinion, and the elected governors of those three States, after the experience of these years, are enabled to write me letters like these, so satisfactory and so conclusive with regard to the area of the experiment as it has been tried with them."

APPENDIX G.

Mr. Charles Neate, M.P., on Fear of Death as a Preventive of Crime.

(*Referred to in note, page* 86.)

Mr. Charles Neate, M.P., in his valuable treatise entitled *Considerations on the Punishment of Death*, Chapter VIII., "On the Fear of Death as a Preventive of Crime," says:—

"We are all of us condemned to die, and that as we well know by an irrevocable sentence, of which the execution cannot be many years deferred, and may be to-morrow; and yet how little do we think of this, not only when youth and health seem to place between us and the dark valley beyond a hill which we have yet to ascend, but when declining age and failing

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health have brought us to the strait and sloping road, out of which there is no turning, and of which, though we cannot see the exact end, we know very well where to look for it. We are even willing for the most futile causes to multiply the chances of death which each day brings with it; we do it for the sake of gain—we do it for the sake of pleasure—we do it even sometimes for the want of something else to do.

"Remembering this, and considering it as we should do, we may well wonder that lawgivers should have trusted so much to the threat of death, that is, to an increased probability of dying in a particular way, as a sort of specific against crime. But, in truth, this was not, I think, the original reason of Capital Punishment. The slaying of the homicide was at first meant as an act of vengeance against him, rather than as a warning to others; it was rather given to the family of the sufferer as a consolation, than exacted by society for its protection; and this primitive notion of the vindictive character of punishment is still, in cases of murder at least, the one which prevails beyond all other notions in the popular mind, and the chief reason with the bulk of mankind, as it is perhaps also the best reason in itself, for maintaining, in this instance, the penalty of death.

"But I am now considering only the uses of this penalty by its terror as a threat; and here I must admit that, however little we may think of death while any uncertainty hangs over its manner or its time—while it is still a shifting and shapeless shadow, upon which the mental eye cannot rest—yet as soon as the when and the how are brought clearly and nearly to us, so that we can both measure our life and realize our death, our utmost energies are taxed, and often in vain, to meet face to face our long-forgotten enemy.

"Death indeed, if we could make death the certain and immediate consequence of crime, would be the most effective terror that human law can dispose of; it is that, at least, into which all other evils which the law can inflict may be resolved by our own choice. But, do what we will, we cannot make

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death the certain consequence of crime. It will be at most but a probable result, of which the chances will be weighed and estimated by a scale of opinion, varying greatly, according to the circumstances in which we may be placed, the feelings with which we may be possessed at the time, and the character by which we may be habitually swayed.

"And here, first, I would call attention to a truth which, obvious as it is, has been strangely overlooked by the advocates of Capital Punishment, namely, that we should judge of the effect of that punishment as a preventive, not by what the criminal seems to feel when the infliction is at hand, but by that which he probably felt at the time that he meditated the crime, or was about to commit it. It may often happen, and there is good reason why it should happen, that the same man who is most overcome at the sight of immediate death, thought least of it when it was distant or doubtful—for the same carnal and sensual habit which yielded so easily to the present impulse or temptation, is equally without force against the present terror; and even as to those who are least liable to be carried away by impulse, who are of a temper to weigh deliberately the probable consequences of their acts, in order to estimate the effects of the fear of death upon their minds, we must go back to the time when it was still an open question with them, whether they should incur the penalty or not. Many, even of such men who would think beforehand, that is, at the time when such thoughts are useful, that perpetual imprisonment was an evil more to be dreaded than death, would yet be more utterly struck down with that which they had supposed to be the lighter sentence. Of perpetual imprisonment we see only the beginning. It is foreshortened to a point—of death, so far at least as it is the end of life, we see at once the whole. The picture is complete at one stroke. It is all spread out before us on one dark plan. I will illustrate this by a comparison that comes home to us all. If we were asked, whether we would rather endure perpetually a mild toothache, or go through for once the pain of tooth drawing,

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we should all of us, without hesitation, prefer the latter; and yet the sight of the dentist and his instrument would disturb our nerves more than the first twinge of the incurable pain. The analogy, and the argument founded on it, would hold good even if we could make death a certain penalty; it applies much more forcibly when to distance is added doubt.

"These are general observations applicable, though in different degrees, to all men. Let us now consider the same point, *i.e.* the efficacy of the fear of death, with a more special application to the character of criminals and the circumstances of crime.

"In the first place, the crime we have to guard against is murder; that is, to speak of it in its commonest, and, therefore, most pernicious form, the killing by violence, for the murder by treachery, or by poison, is rare and exceptive. Now, however base and cowardly in one sense it may be to kill a man at an advantage, which a murderer either always does or tries to do; yet it is so far a sign, if not an act of courage, that it is most easily and readily done by men of fearless natures. It is not only that there is the actual shedding of blood from which the timid recoil, even if it can be safely done, for they see in another man's the image of their own; but there is, for the most part, a good deal of actual danger quite apart from the legal consequences attaching to the commission of that sort of murders which we have most to guard against, those, for instance, which arise out of violent robbery; and, reluctant as we may be to apply a noble word to so base a use, murderers, whether by gift of nature or acquired hardihood, as a class are brave men. Rush was a brave man, Thurtell was a brave man, Mrs. Manning as brave as any man; and, therefore, when we are trusting to Capital Punishment as our security against murder, we should remember that we are using the threat—it can be only the threat—of death against those who are less liable to be moved by it than the majority of mankind; and we have seen how little even these think of death till it is certain and immediate. The word threat,

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which I have just used, suggests one objection to Capital Punishment which I have not seen elsewhere urged, and which, to many, will seem fanciful; but I believe that the denunciation of death as a penalty has, like the sight of a bare weapon, or the smell of gunpowder, an irritating and provocative, as well as a deterring effect, and that there are some natures even among criminals which are rather spurred to the commission of crime, or at least have their scruples lessened, by the thought that in taking the life of another they are risking or giving their own."

APPENDIX H.

Mr. Alderman Harmer's Evidence in 1819.

(Referred to at pp. 137 and 227.)

Evidence given by Mr. Alderman Harmer, before the Select Committee of the House of Commons appointed to consider of so much of the criminal law as relates to Capital Punishments in felonies, &c. 18th May, 1819.

"You are a solicitor, residing in Hatton Garden?—I am.

"You have had considerable experience in Crown practice at the Old Bailey?—I have.

"For how many years?—Twenty years, within a few months, for myself; and upwards of three years previous to that time in the office of Messrs. Fletcher and Wright, to whom I was last articled.

"Have you any observations to make with respect to the effect of Capital Punishments?—I have. First, as to forgery: it appears to me that the punishment of death has no tendency to prevent this crime. I have, in many instances, known prosecutors decline proceeding against offenders, because the punishment is so severe. Instances have come within my knowledge of bankers and opulent individuals, who, rather than take away the life of a fellow-creature, have compromised

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with the delinquent. Instances have occurred of a prosecutor pretending to have had his pocket picked of the forged instrument. In other cases, prosecutors have destroyed or refused to produce it; and when they have so refused, they have stated publicly that it was because the person's life was in jeopardy. I will relate a very recent circumstance that occurred under my observation at the Old Bailey. A person, through whose hands a forged bill had passed, and whose appearance upon the trial was requisite to keep up the necessary chain of evidence, kept out of the way to prevent the conviction of the prisoner—it was a private bill of exchange. I also know another recent instance, where some private individuals, after the commitment of a prisoner, raised a thousand pounds for the purpose of satisfying some forged bills of exchange; and they declared, and I have good reason to know the fact, that if the punishment had been anything short of death, they would not have advanced a farthing, because he was a man whose conduct had been very disgraceful; but they were friends to the man's family, and wished to spare them the mortification and disgrace of a relative being executed, and therefore stepped forward and subscribed the before-mentioned sum. I have frequently seen persons withhold their testimony, even when under the solemn obligation of an oath to speak the whole truth, because they were aware that their testimony, if given to its full extent, would have brought the guilt home to the parties accused; and they have, therefore, kept back a material part of their testimony. In all capital indictments, with the exception of murder and some other heinous offences, I have often observed prosecutors show great reluctance to persevere, frequently forfeiting their recognizances; and, indeed, I have, on many occasions, been consulted by prosecutors as to the consequences of refusing to conform to their recognizances, that is, to appear and prosecute the prisoner.

"When you speak of the cases of murder and other heinous offences, do you mean offences accompanied with violence to

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the person, or which are likely in their consequences to inflict serious injury?—Certainly; those are the offences to which I allude. I know that many persons who are summoned to serve as jurymen at the Old Bailey have the greatest disinclination to perform the duty, on account of the distress that would be done to their feelings in consigning so many of their fellow-creatures to death, as they must now necessarily do, if serving throughout a session; and I have heard of some who have bribed the summoning officer to put them at the bottom of their list, or keep them out altogether, so as to prevent them from discharging this painful duty; and the instances, I may say, are innumerable, within my own observation, of jurymen giving verdicts, in capital cases, in favour of the prisoner directly contrary to the evidence. I have seen acquittals in forgery, where the verdict has excited the astonishment of every one in court, because the guilt appeared unequivocal, and the acquittal could only be attributed to a strong feeling of sympathy and humanity in the jury to save a fellow-creature from certain death. The old professed thieves are aware of this sympathy, and are desirous of being tried, rather on capital indictments, than otherwise. It has frequently happened to myself, in my communications with them, that they have expressed a wish that they might be indicted capitally, because there was a greater chance of escape. In the course of my experience, I have found that the punishment of death has no terror upon a common thief; indeed, it is much more the subject of ridicule among them than of serious deliberation: their common expressions among themselves used to be, 'such a one is to be twisted;' and now it is 'such a one is to be top't.' The certain approach of an ignominious death does not seem to operate upon them, for after the warrant has come down for their execution, I have seen them treat it with levity. I once saw a man, for whom I had been concerned, the day before his execution; and on my offering him condolence, and expressing my sorrow at his situation, he replied, with an air of indifference, 'Players at bowls must expect rubbers.'

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Another man I heard say, that it was only a few minutes, a kick and a struggle, and it was all over; and that if he was kept hanging for more than an hour, he should leave directions for an action to be brought against the sheriffs and others; and others I have heard state, that they should kick Jack Ketch in their last moments. I have seen some of the last separations of persons about to be executed, with their friends where there was nothing of solemnity in it; and it was more like parting for a country journey than taking their last farewell. I heard one man say (in taking a glass of wine) to his companion, who was to suffer next morning, 'Well, here's luck.' The fate of one set of culprits, in some instances, had no effect even on those who were next to be reported; they play at ball, and pass their jokes, as if nothing was the matter. I mention these circumstances to show what little fear common thieves entertain of Capital Punishment; and that so far from being arrested in their wicked courses by the distant possibility of its infliction, they are not even intimidated at its certainty; and the present numerous enactments to take away life appear to me wholly inefficacious. But there are punishments which I am convinced a thief would dread, and which, if steadily pursued, might have the most salutary effect; namely, a course of discipline totally reversing his former habits. Idleness is one of the prominent characteristics of a professed thief—put him to labour. Debauchery is another quality, abstinence is its opposite—apply it. Dissipated company is a thing they indulge in — they ought, therefore, to experience solitude. They are accustomed to uncontrolled liberty of action—I would, consequently, impose restraint and decorum: and were these suggestions put in practice, I have no doubt we should find a considerable reduction in the number of offenders. I say this, because I have very often heard thieves express their great dislike and dread of being sent to the House of Correction, or to the hulks, where they would be obliged to labour, and be kept under restraint; but I never heard one say he was afraid of being hanged. Formerly, before Newgate was under the

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regulations that it now is, I could always tell an old thief from the person who had for the first time committed crime. The noviciate would shudder at the idea of being sent to Newgate, but the old thief would request that he might be committed at once to that prison by the magistrate, because he could there associate with his companions, and have his girl to sleep with him, which some years back used to be allowed or winked at by the upper turnkeys; but since the late regulations, certainly, I have not heard of such applications being made by thieves, because now they are as much restrained and kept in order in Newgate as in other prisons. From my observation, I am quite certain that a thief cannot bear the idea of being kept under subordination. As to transportation, I, with deference, think it ought not to be adopted, except for incorrigible offenders, and then it ought to be for life. If it is for seven years, the novelty of the thing, and the prospect of returning to their friends and associates, reconciles offenders to it, so that, in fact, they consider it no punishment: and when this sentence is passed on men, they frequently say, 'Thank you, my lord.' Indeed this is a common expression, used every session by prisoners, when sentenced to seven years' transportation.

"Have you any particular observations to make on the offences of stealing in shops, and privately stealing in dwelling-houses?—I have; the stealing in a dwelling-house above the value of 40*s*., and privately stealing in a shop to the value of 5*s*., is capital; and though I have frequently been present where the evidence has, in my mind, amounted to demonstration, and it has struck me that many of the articles were of such value as to imperiously call upon the jury for a verdict of guilty, they have, from motives of compassion, given a verdict contrary to such evidence, by reducing the value of the article stolen so low, as to lessen the offence to grand larceny.

"What are the offences in which you think there is neither a general reluctance to prosecute nor to convict?—Murder, arson, burglary; but not in its extended sense, such as break-

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ing a pane of glass or lifting a latch, but where it is committed by a professed house-breaker, who breaks into a house in the middle of the night; highway robbery accompanied with violence; cutting and other offences under Lord Ellenborough's Act, where it is the clear intent of the offender to commit murder, but the interposition of Divine Providence or accident only prevents its accomplishment.

"Do you not think that the offenders who have the least fear of death are the most dissolute and idle?—Certainly, they are.

"And, therefore, the most likely to feel confinement and hard labour very much?—Certainly; I believe it would be felt by them as the greatest punishment that could be inflicted.

"Have you made any observation with respect to the expense and trouble that might be saved to prosecutors, by trying accessaries after the fact in the same county with the principals?—I have; some years ago an Act of Parliament passed to enable the prosecutor to try the accessary *before* the fact, in the same county with the principal. This Act has been found extremely useful; but it appears to me that it would very much facilitate the purposes of justice, if the accessary *after* the fact were also to be liable to be tried with the principal, because prosecutors, after convicting the principal in one county, are now frequently put to very great expense in being obliged to go to another county to prosecute the receiver, and have all the chances of a failure of justice, in losing their witnesses by death or other accidental causes.

"Can you state the average number of persons for whom you have been professionally engaged, yearly, at the Old Bailey?—I cannot with certainty; but, on a moderate computation, I should think one hundred prisoners yearly; and, during my experience at the Old Bailey, I have had personal communication with two thousand or more prisoners.

"Latterly you have been employed in many prosecutions also?—I have.

"Have you not also had frequent opportunities of observing

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the feelings of prosecutors and of prisoners?—Certainly; for the last eight years my business for prosecutions has been progressively increasing.

"But when you were employed professionally for the prisoners, had not you an opportunity of observing the feelings of prosecutors also?—Certainly; from attending the examinations, I had an opportunity of observing the wishes and feelings of prosecutors.

"Are the committee to understand you as stating that you consider Capital Punishments to be efficacious only in those cases where the general feelings of the public go along with them?—Certainly; the thieves observe the sympathy of the public, and it seems to console them, and they appear less concerned than those who witness their sentence. I have been present on very many occasions when the sentence of death has been passed, and the criminals have been far less affected than the auditors.

"Do you think that the general feeling goes along with the infliction of the punishment of death, in the cases of crime unaccompanied with violence?—Certainly, it does not.

"Do you conceive that the infliction of the punishment of death in those cases tends rather to excite the public feeling against the criminal laws?—No doubt it does; there are, I believe, very few advocates for the generality of the present Capital Punishments.

"Do you mean to apply that observation to those who have had the most experience of the effect of those Capital Punishments?—I should think I might safely so apply it."

[Mr. Alderman Harmer gave evidence before the Royal Commissioners in 1836, when he, in every respect, maintained the views so tersely expressed in the above excerpt. (*Vide* Second Report on Criminal Law, dated June, 1836, pp. 80–88.)]

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APPENDIX I.

An Execution in London in 1864.

(Referred to in note, p. 139.)

The following is excerpted from the report which appeared in *The Times* of November 15, 1864, of Müller's execution :—

"A great crowd was expected round the gallows, and indeed a great crowd came. The barriers to check the crowd were begun across all the main streets which lead to Newgate as early as on Friday last, and all through Friday night and on Saturday and Sunday a dismal crowd of dirty vagrants kept hovering round them. These groups, however, were not composed of the real regular *habitués* of the gallows, but of mere young beginners, whose immature tastes were satisfied with cat-calls in the dark, fondling the barriers, or at most a hurried, scrambling throw of dirt at the police when they dispersed them. It was different, however, on Sunday night. During the early part of the evening there was a crowd as much of loungers as of drunken men, which stood the miserable drizzle with tolerable patience, while the public-houses were open and flared brightly through the mist. But at eleven o'clock a voluntary weeding of the throng commenced. The greater part of the rough mass moved off, leaving the regular execution crowd to take their early places. These were soon occupied. For a little time there seemed something which was not alone confusion, but indecision in the throng, till the dirty chaos settled itself down at last, and while noisy groups went whooping and wrangling away, a thick, dark, noisy fringe of men and women settled like bees around the nearest barriers, and gradually obliterated their close white lines from view. It was a clear bright moonlight night. Yet, though all could see, and well be seen, it was impossible to tell who formed the staple of this crowd that gathered to their sight so early. There were well-dressed and ill-dressed, old men and lads, women and girls. Many had jars of beer; at least half were smoking, and the lighting of fusees was

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constant, though not more constant than the cries and laughter as all who lit them sent them whirling and blazing over their heads into the thicker crowd beyond. Occasionally as the rain, which fell heavily at intervals, came down very fast, there was a thinning of the fringe about the beams, but, on the whole, they stood it out very steadily, and formed a thick dark ridge round the enclosure kept before the Debtors' door, where Müller was to die. This was at one o'clock, when the moon was bright, and the night very clear indeed, and everything could be seen distinctly. . . . Till three o'clock it was one long revelry of songs and laughter, shouting, and often quarrelling, though, to do them mere justice, there was at least till then a half drunken ribald gaiety among the crowd that made them all akin. Until about three o'clock not more than some 4,000, or at the most 5,000, were assembled, and over all the rest of the wide space the white unoccupied barriers showed up like a network of bones above the mud. But about three, the workmen came to finish the last barriers after the scaffold had been carried to the Debtors' door, and from that time the throng rapidly increased in numbers. Worse in conduct it could not be, though still night hid its ruffianism. Some one attempted to preach in the midst of the crowd, but his voice was soon drowned amid much laughter. Then there was another lull, not, indeed, of quiet, but at least a lull from any pre-eminent attempt at noise, though every now and then it was broken by that inexplicable sound like a dull blow, followed, as before, always by laughing, sometimes by fighting. Then, again, another man, stronger in voice and more conversant with those he had to plead before, began the old familiar hymn of "The Promised Land." For a little time this man sung alone, but at last he was joined by a few others, when another and apparently more popular voice gave out some couplet in which at once, and as if by magic, the crowd joined, with the chorus of—

Oh my!
Think, I've got to die.

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Till this again was superseded by the song of—

Müller, Müller,
He's the man.

All these vocal efforts, however, were cut short by the dull, rumbling sound which, amid cheers, shouts, whoopings, clapping of hands, hisses, and cries of 'Why wasn't it brought out for Townley?' heralded the arrival of the dirty old gallows. This was for the time a great diversion, and the crowd cheered or hissed in parts, or as the humour took them, while the horses were removed and the lumbering black box was worked back slowly and with difficulty against the door of the gaol. The shouts and obscene remarks which were uttered as the two upright posts were lifted into their places were bad enough, but they were trifles as compared with the comments which followed the slow efforts of the two labourers to get the cross-beam into its place. At last this was finished, and then, amid such yells as only such sightseers, and so disappointed, could give vent to, a strong force of police filed in and took their places, doubly lining the enclosure round the drop, right before the foremost of the hungry crowd, who had kept their places through wet and dry, since Sunday night. . . . . Among the throng were few women; and even these were generally of the lowest and the poorest class, and almost as abandoned in behaviour as their few better dressed exceptions. The rest of the crowd was, as a rule, made up of young men, but such young men as only such a scene could bring together —sharpers, thieves, gamblers, betting men, the outsiders of the boxing ring, bricklayers' labourers, dock workmen, German artisans and sugar-bakers, with a fair sprinkling of what may be almost called as low a grade as any of the worst there met— the rakings of cheap singing-halls and billiard-rooms, the fast young 'gents' of London. But all, whether young or old, men or women, seemed to know nothing, feel nothing, to have no object but the gallows, and to laugh, curse, or shout as in this heaving and struggling forward they gained or lost in their strong efforts to get nearer to where Müller was to die.

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There can be only one thing more difficult than describing this crowd, and that is to forget it. . . . [After the drop had fallen.] For five or ten minutes the crowd, who knew nothing of his confession, were awed and stilled by this quiet, rapid passage from life to death. The impression, however, if any real impression it was beyond that of mere curiosity, did not last for long, and before the slight, slow vibrations of the body had well ended, robbery and violence, loud laughing, oaths, fighting, obscene conduct, and still more filthy language reigned round the gallows far and near. Such, too, the scene remained, with little change or respite, till the old hangman slunk again along the drop amid hisses and sneering inquiries of what he had had to drink that morning. He, after failing once to cut the rope, made a second effort more successfully, and the body of Müller disappeared from view."

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APPENDIX K.

Statistics of Murder in England and Wales.

Extracted from Parliamentary Return, No. 21, Feb. 3, 1846, and from the Annual Volumes of the "Judicial Statistics," by Mr. Tallack.

Year.	Total Executed.	Executed for Murder only.	Committed for Trial for Murder.	Convicted of Murder.
1813	120	25	87	30
1814	70	23	80	25
1815	57	15	62	15
1816	95	21	85	30
1817	115	25	82	25
1818	97	13	51	13
1819	108	15	69	20
1820	107	10	49	14
1821	114	22	71	23
1822	95	18	86	24
1823	54	12	60	13
1824	49	14	70	16
1825	50	10	93	12
1826	57	10	57	13
1827	73	11	65	12
1828	59	18	83	20
1829	74	13	47	13
1830	46	14	65	16
1831	52	12	56	14
1832	54	15	61	20
1833	33	6	52	9
1834	34	12	86	13
1835	35	21	78	25
1836	17	8	73	20
1837	8	8	43	11
1838	6	5	75	25
1839	10	10	46	13
1840	9	9	54	18
1841	10	9	66	20
1842	9	9	67	16
1843	13	13	85	22
1844	16	16	75	21
1845	12	12	65	19

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Year.	Total Executed.	Executed for Murder only.	Committed for Trial for Murder.	Convicted of Murder.
1846	6	6	68	13
1847	8	8	72	19
1848	12	12	76	23
1849	15	15	84	19
1850	6	6	52	11
1851	10	9	74	16
1852	9	9	81	16
1853	8	8	79	17
1854	5	5	62	11
1855	7	7	57	11
1856	16	16	82	31
1857	14	13	70	20
1858	11	11	66	16
1859	9	9	70	18
1860	12	12	49	16
1861	15	14	64	26
1862	15	15	77	28
1863	22	22	83	29

NOTE.—Since 1841 there has only been one execution for any crime except murder. Attempted murder is no longer capital. In 1862 sixteen persons were left for execution, but one of them committed suicide before the day fixed for his death on the gallows (at Lancaster). The above statistics cannot be carried back, reliably, further than 1813.

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